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IN THE

Supreme Court of the United States

SEA HUNT, INCORPORATED,

Petitioner,

v.

KINGDOM OF SPAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When, in an *In Rem* salvage action, does adjudication of ownership become necessary?*

When adjudication of ownership becomes necessary, what uniform standard of "abandonment" must admiralty courts apply?*

In a maritime salvage action, how can a Plaintiff/Salvor show "express abandonment" by an intervening sovereign who claims ownership of a vessel that was lost and forgotten hundreds of years ago?

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* These two questions are also presented in the Petition for a Writ of Certiorari filed by *International Aircraft Recovery, LLC v. Unidentified Wrecked and Abandoned Aircraft, et al.* filed October 16, 2000 (Docket No. 00-617).

PARTIES TO THE PROCEEDING

The Petitioner/Salvor is Sea Hunt, Incorporated, a Virginia corporation.

The Intervenor/Plaintiff is the Commonwealth of Virginia.

Respondent (Intervening Claimant below) is a foreign sovereign, the Kingdom of Spain.

Pursuant to Supreme Court Rule 29.1, Petitioner avers that it does not have any parent companies and no publicly held company owns 10% or more of its stock.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Fourth Circuit (App. A) is reported at *Sea Hunt, Incorporated v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000). There are three District Court Opinions and/or Orders. The District Court Final Judgment, dated April 27, 1999 (App. B) is reported at *Sea Hunt Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. VA. 1999). The District Court denial of the United States' Motion to Intervene in order to assert the Kingdom of Spain's claim of ownership, dated September 25, 1998 (App. C) is reported at *Sea Hunt Inc. v. The Unidentified Shipwrecked Vessel or Vessels, etc. in rem*, 22, F. Supp. 2d 521 (E.D. Va. 1998). The District Court's denial of the United States' Motion to Intervene to assert it's regulatory authority over the navigable waters where the sunken vessels were allegedly located, dated September 23, 1998 (App. D) is reported at *Sea Hunt Inc. v. The Unidentified Shipwrecked Vessel or Vessels, etc, in rem*, 182 F.R.D. 206 (E.D. VA. 1998).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 21st, 2000. (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Article III, Section 2, Clause 1; "JURISDICTION OF COURTS" provides: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction . . .".

The Constitution of the United States, Article IV, Section 3, Clause 2; "PUBLIC LANDS", provides: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States: and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

STATEMENT OF THE CASE

The Petitioner/Salvor, Sea Hunt, Inc., (Sea Hunt) is a Virginia corporation under contract to the Commonwealth of Virginia (Virginia) to explore for and salvage abandoned shipwrecks imbedded in certain submerged lands within Virginia's territorial waters. (App. D at 76a). On March 11th, 1998, Sea Hunt filed verified *In Rem* admiralty complaints against two shipwrecks. The complaints alleged that pursuant to the Abandoned Shipwreck Act of 1987 (ASA) 43 U.S.C. §§ 2101-2106, the Commonwealth of Virginia was the owner of the shipwrecks and Sea Hunt was entitled to salvage the wreck(s) under the Virginia permit. (App. B at 33a). Alternatively, Sea Hunt requested a liberal salvage award for recovering the artifacts from their "marine peril". In order to protect the ongoing salvage from interference by third parties, Sea Hunt requested an injunction prohibiting third parties from interfering with the salvage operations. In addition to these standard requests in an *In Rem* salvage action, Sea Hunt also asked for a declaratory judgment of whether the Kingdom of Spain (Spain) had any claim to these wrecked vessels and a declaratory judgment that no

government other than the Commonwealth of Virginia (including the United States or any foreign sovereign) had jurisdiction to regulate the salvage operations. (App. B at 33a).

On March 12th, 1998, the admiralty court issued an Order directing the *In Rem* arrest of the vessels, granted Sea Hunt the exclusive right to continue the salvage activities and appointed Sea Hunt as Substitute Custodian. (App. B at 33a).

On May 13th 1998, the Commonwealth of Virginia filed a Verified Claim and Answer asserting that Virginia was the rightful owner of the wrecks under the ASA and that Sea Hunt's salvage activities were pursuant to the Virginia permits. (App. B at 34a).

On May 18th, 1998, the United States moved to Intervene and asserted that it had regulatory authority over the salvage operation due to the fact that salvage was taking place adjacent to the boundaries of the "Assateague Island National Seashore". The United States also sought to file an ownership claim on behalf of the Kingdom of Spain. (App. B at 34a).

On May 20th, 1998, Virginia, in an abundance of caution, filed an Intervening Complaint asserting ownership and on June 15th, 1998, Sea Hunt answered admitting that Virginia was the owner of the shipwrecked vessels. (App. B at 35a).

On August 21st, 1998, the United States moved to modify the Court's March 12, 1998 Order granting *Sea Hunt* the exclusive right to continue salvage in order to "allow the National Park Service to regulate the salvage operations off the Assateague Island National Seashore". (App. B at 35a). On September 23rd, the Court denied intervention by the United States (permissive *and* as of right) holding that "the United States has failed to show an interest in the subject matter." (App. D at 77a).

Sea Hunt also opposed the United States' attempt to intervene on behalf of Spain. In it's September 25th, 1998 ruling, the trial court stated,

> The United States has no real interest in the shipwrecks at issue in this case. If this Court finds that they are abandoned, then they belong to the Commonwealth of Virginia under the Abandoned Shipwreck Act. *See* 43 U.S.C. § 2105. If this Court finds that the ships have not been abandoned, then they belong to the Kingdom of Spain. In either instance, the United States' interests are not at stake.

(App. C at 71a). The United States' Motion to Intervene on behalf of Spain was denied and Spain was allowed time to obtain other counsel. On December 23rd, 1998, a Washington, D.C. law firm filed a Motion to Intervene and Verified Claim on behalf of Spain. (App. B at 37a).

On April 1st, 1999, the trial court scheduled final arguments and on April 27th, 1999, entered its Final Order. (App. B).

As a "preliminary matter", the court took judicial notice that in *Quicksilver International Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, Case No. 88-618-N (E.D. Va. filed September 13, 1988), the Court had awarded a Salvor the exclusive salvage rights to a shipwrecked vessel and that, based upon the recoveries from the wrecksite and the investigation of other historical data, the salvor, Quicksilver, believed the shipwreck to be the remains of the Spanish vessel *Juno*, the *same* vessel that Sea Hunt believed to be one of the *In Rem* Defendants in the case at bar. (App. B at 38a). At the hearing of April 1st, 1999, counsel for *Quicksilver* and Sea Hunt "assured the Court that they

had conferred, compared locations, and determined that their clients were making claims against, and were concerned with, different shipwrecks" and the attorney for Spain informed the Court that Spain "believed that Sea Hunt, and not *Quicksilver*, had found the actual *Juno*." (App. B at 39a). When the issue of a salvage award was later considered by the trial court, Spain's May 26, 1999 Supplemental Brief (page 7) stated that "Sea Hunt has not even located the *Juno*, much less salvaged it."

Based *entirely* upon Sea Hunt's "assumption" that the *In Rem* Defendants were, in fact, the Spanish Vessels *Juno* and *La Galga*, the trial court made certain factual and legal findings. The Court found it, "unnecessary to the disposition of this case to decide whether *La Galga* and *Juno* were indeed warships at the time of their respective sinkings." (App. B at 42a). The Court went on to find that "there is no doubt that at one point in time *Juno* and *La Galga* belonged to Spain." (App. B at 42a). The Court held that, "Virginia's, and by extension Sea Hunt's, claim rests on the Abandoned Shipwreck Act of 1987 (ASA), a Federal Act." And that, "Thus, if this Court finds that *Juno* and *La Galga* have at any time been abandoned by Spain, then according to the ASA, the wrecks belong to Virginia." (App. B at 43a).

In the Final Judgment, the trial court found that the Fourth Circuit's case of *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993) which required "express abandonment" by cargo insurance companies, to be "binding authority on this court." (App. B at 48a). In finding itself bound by the decision in *Columbus-America*, the trial court stated, "In a case where the original owner appears, abandonment may not be inferred, but must be proven, regardless of how long the ships have been lost, and regardless of the character of the vessel. The Columbus-

America case makes no distinction between private vessels and public vessels such as warships." (App. B at 48a). The trial court held that Spain was the owner of the *Juno* and *La Galga* when they were lost and that Sea Hunt must show by "strong and convincing evidence" an "express abandonment" by Spain. (App. B at 49a).

The trial court, in its Final Judgment, found that Spain had "affirmatively abandoned" the *La Galga* and that Virginia owned the shipwreck under the terms of the Abandoned Shipwreck Act. (App. B at 53a). The trial court's Final Judgment went on to hold that:

> neither the 1819 Treaty, nor the Declaration of War in 1898 [between the United States and Spain] contained any evidence of any abandonment of *Juno* by Spain. (App. B at 57a). Therefore, Spain retains title to *Juno's* wreck, and Virginia has no claim to *Juno* under the Abandoned Shipwreck Act. Sea Hunt may not, without Spain's permission, continue salvage operations on the remains of *Juno*.

(App. B at 58a). Spain refused permission for further salvage operations and the trial court entered its Order stopping salvage and reserving ruling on whether Sea Hunt was entitled to a salvage award. (App. B at 58a).

After considering whether to recognize Sea Hunt's maritime lien for the purpose of setting a salvage award, the District Court found:

> it is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the *Juno* was a Spanish ship and that *Spain might make a claim of ownership and*

> *decline salvage* . . . because Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on *JUNO*, Sea Hunt cannot be entitled to any salvage award.

(Emphasis supplied) (App. A at 27a).

The District Court's April 27th, 1999 Final Judgment was appealed to the Fourth Circuit and on July 21st, 2000, the Fourth Circuit entered its Order. (App. A). Again, based *entirely* upon Sea Hunt's assumption that the two shipwrecks were the Spanish vessels *Juno* and *La Galga*, the Fourth Circuit reversed the Judgment of the District Court finding that Spain had *not* affirmatively abandoned the *La Galga*. The Fourth Circuit affirmed the Judgment of the District Court as to the *Juno* holding that "both vessels remain the property of Spain." (App. A at 27a). The Fourth Circuit also affirmed the District Court's prohibition of further salvage and denial of Sea Hunt's salvage award. (App. A at 27a).

REASONS FOR GRANTING THE WRIT

Preliminary Statement

The Commonwealth of Virginia is filing its own Petition for Writ of Certiorari and it is expected that numerous states will file Amicus Curiae Briefs in support of the Petition of Sea Hunt, Inc., and Commonwealth of Virginia. These Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit are *directly* related to the Eleventh Circuit decision in *International Aircraft Recovery LLC v. The Unidentified Wrecked and Abandoned Aircraft, et al.*, 218 F.3d 1255 (11th Cir. 2000) issued just four (4) days before the Fourth Circuit's decision in *Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels*. (App. A).

The Fourth Circuit's *Sea Hunt* decision requires that the salvage of shipwrecks of vessels originally owned by Spain "shall receive the same immunities conferred upon similarly situated vessels of the United States". (App. A at 15a). The Eleventh Circuit's decision in *International Aircraft Recovery*, held that the assertion of ownership by the Intervenor, United States, would be immune from attack unless a Plaintiff/Salvor could show "an affirmative act [of abandonment] authorized by Congress". *Id.* 218 F.3d at 1258. Because the Fourth Circuit's *Sea Hunt* decision requires the admiralty courts to provide the "same immunities" to Spanish vessels as are provided to vessels of the United States, the *Sea Hunt* and *International Aircraft Recovery* decisions are inextricably intertwined. The Petition for Writ of Certiorari in *International Aircraft Recovery*, (Docket No. 00-617) was filed with this Court on October 16th, 2000. The questions presented and the reasons for granting the writ contained in that Petition should be considered for the purpose of this Court's ruling on the Petitions of Sea Hunt and Commonwealth of Virginia.

I.

NEITHER THE GOVERNMENT OF SPAIN NOR THE UNITED STATES IS EXEMPT OR IMMUNE FROM AN *IN REM* SALVAGE ACTION UNLESS THE ACTUAL POSSESSION OF THE SOVEREIGN MUST BE INVADED UNDER PROCESS OF THE COURT.

In the Fourth Circuit's *Sea Hunt* decision, Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain was quoted for the proposition that "in cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other . . . *the same immunities* which would have been granted to its own vessels in similar cases." (emphasis supplied) (App. A at 14a). The Fourth Circuit went on to hold that the

1902 Treaty of Friendship requires United States Admiralty Courts to provide shipwrecks claimed by Spain with the "same immunities conferred upon similarly situated vessels of the United States." (App. A at 14a). Make no mistake about it, the Fourth Circuit is providing Spain a sovereign immunity and/or exemption from a direct proceeding *In Rem* against all vessels originally owned by Spain! In *California v. Deep Sea Research, Inc.*, this Court clearly stated that the United States and foreign governments have *no* sovereign immunity in *In Rem* proceedings to enforce a maritime lien against their property *except* ". . . where, in order to sustain the proceeding the possession of the [sovereign] must be invaded under process of the court." *Id.* 523 U.S. at 507.

The Fourth Circuit's providing of sovereign immunity and/or exemption to Spain does *not* turn on the sovereign's possession of the *res*, but on a faulty, two-step procedure. First, the intervening sovereign's claim of ownership was accepted on the basis that when the vessels were lost, hundreds of years ago, they were owned by Spain. Second, the Fourth Circuit requires that the admiralty court accept Spain's verified claim that it's title and ownership interest in the vessel was never "abandoned or relinquished or transferred". (App. A at 8a). The Plaintiff/Salvor's *In Rem* maritime salvage lien was invalidated and salvage award denied because there was no "formal authorization by the government of Spain." (App. A at 8a). This *is* sovereign immunity *unless* it is "waived" by the sovereign. The *knowledge* of the location is not even an issue, much less actual possession.

Although we may want to "blindfold" Justice, we can't allow Justice to become oblivious to the facts. There is absolutely *no* proof that one of these vessels is the *Juno*. For twelve years, another salvor, Quicksilver International, has been salvaging a wrecksite that historical data and actual recoveries indicate may be the wrecksite of the *Juno*. (App. B at 38a).

There is no dispute that *Juno* was being abandoned by its passengers and crew, "but only seven persons were able to transfer [to an *American* ship] before the storm picked up and *Juno* was lost in heavy fog." (App. A at 6a). That was one hundred ninety-eight years ago! Is the wrecksite found by Sea Hunt that of the *Juno*? Quicksilver doesn't think so, but one thing is certain, if this Court doesn't grant this Writ, we will *never* know for sure. The *La Galga* was looted and partially salvaged by its Spanish Captain over two hundred and fifty years ago! There is *no* dispute of the fact that "further salvage efforts ended [in 1750] when a second storm came and *broke up what was left of the ship. La Galga* remained undisturbed until the recent salvage efforts by Sea Hunt." (emphasis supplied) (App. A at 6a). If, on these facts, an admiralty court is prohibited from concluding that the Spanish *abandoned* "what was left of the ship" two hundred fifty years ago, then justice is not only blind, but oblivious.

If a salvor carries out historical and archaeological research during the salvage of the wrecksite of a vessel and determines at some point during salvage activities that the wrecksite is more than likely a Spanish vessel, would *anyone* be foolish enough to disclose this historical data? In *Cobb Coin Company, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982), Judge James Lawrence King talked about the necessity of recording valuable historical and archaeological information from historic wrecksites of the Spanish Fleet of 1715. Judge King stated:

> This Court now holds that in order to state a claim for a salvage award on an ancient vessel of historical and archaeological significance, it is an essential element that the salvors document to the admiralty courts satisfaction that it has preserved

> the archaeological provenience of a shipwreck. Id. 549 F.Supp at 559.

If the salvor documents the identification and historic significance of a wrecksite, is the maritime lien and salvage award to be lost (again) to a sovereign claim of ownership?

To require a voluntary salvor to prove "express abandonment" by an intervening sovereign over vessels which were lost and forgotten long before there was any legal concept of "express abandonment" is not only the death of common sense, but it is the death of the Abandoned Shipwreck Act of 1987 (ASA), 102 Stat. 432, 43 U.S.C. §§ 2101-2106. In *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 105 F.3d 1078, 1085 (6th Cir. 1997), *vacated on other grounds*, 523 U.S. 1091 (1998), the Sixth Circuit noted, "Common Sense makes readily apparent that the [ASA] did not contemplate a court's requiring express abandonment; such explicit action is obviously rare indeed". Using common sense, when would Spain have ever thought to *expressly* abandon "what was left" of *La Galga*? Why would Spain go through formal authorization to expressly abandon the *Juno* "lost in heavy fog" hundreds of years ago? (App. A at 6a).

There should be no argument whatsoever that this Court's unanimous decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) had, as its fundamental premise, that the state, the federal government, or a foreign government has *no exemption and/or immunity* from a direct proceeding *In Rem* against it's vessel unless the state, the federal government, or a foreign government is in *actual possession* of the vessel. *Id.* 523 U.S. at 507. It is fairly obvious that this Court "unanimously" believed that its "reminder" to apply the general maritime Law of Abandonment would somehow resolve future conflicts among the lower courts making such determinations. *Id.* 523 U.S. at 508. During the

last two and one-half years, it should be crystal clear that the maritime abandonment standard this Court referred to in *Deep Sea Research* was *not* a requirement that a salvor or a state prove "express abandonment" by an intervening sovereign, claiming ownership of wrecksites it never knew existed, much less actually possessed.

The Fourth Circuit held that for Sea Hunt and the Commonwealth of Virginia to prove "express abandonment" of the wrecksites of the lost and forgotten *Juno* and *La Galga*, they would have to show . . . "formal authorization by the government of Spain." (App. A at 8a). This Court has unanimously denied sovereign immunity as to an *In Rem* salvage claim (unless the sovereign has actual possession). This Court must not allow the United States (and its Spanish allies) to rely on "express abandonment" as a "replacement" to sovereign immunity!

If there is *any* doubt as to the direct conflict with the legal position of the United States and Spain as to sovereign immunity and this Court's *Deep Sea Research* decision, compare the following direct quotes:

Deep Sea Research, 523 U.S. at 507:

> The Court's jurisprudence respecting the *sovereign immunity of foreign governments* has likewise turned on the sovereign's possession of the *res* at issue. (emphasis supplied)

* * *

From the "Statement of Interest" of the United States in support of Spain in *Sea Hunt*, App. A at 14a:

> No other Friendship, Commerce and Navigation (FNS) Treaty of the United States contains such a broadly worded provision applying to state ships *entitled to sovereign immunity*. (emphasis supplied)

The Fourth and Eleventh Circuit's have allowed a sovereign's withholding of "formal authorization" and announced lack of an "express abandonment" to get around this Court's "actual possession" requirement in order to invoke sovereign immunity!

The maritime standard of "abandonment" referred to by this Court in *Deep Sea Research* was that "abandonment occurs *either* when title to a vessel has been affirmatively renounced *or when circumstances give rise to an inference that the vessel has been abandoned*." (emphasis supplied) *Id.* 523 U.S. at 499. During the last two and one-half years, the Circuit Courts have sharply disagreed as to when property lost at sea may be considered as "abandoned". The divisions between the Circuits can be roughly characterized as points along a doctrinal continuum from "express" to "implied" to "presumed" abandonment. For the last couple of hundred years, this Court apparently deemed it sufficient to leave it up to the admiralty courts to determine "abandonment" on the basis of *all* of the facts and circumstances of each individual case. Because the very judicial nature of a maritime abandonment determination should, and would, be so fact intensive, the rulings of the admiralty/trial courts have only been subject to review for clear error. What once seemed obvious has become obscured in all the attention devoted to the "express abandonment" standard that sovereign intervenors wish to substitute for their lack of sovereign immunity.

At stake in this Petition is the proper application of the general maritime law standard of abandonment of property lost and forgotten by its original owner. Make no mistake about it, unless an *implied abandonment standard* is adopted for use by all United States Admiralty Courts, the Abandoned Shipwreck Act will be rendered useless and hundreds of shipwrecks of historic or cultural significance will never be rescued from their maritime peril. To date, all fifty states have enacted laws to encourage or require preservation of areas of historic or cultural significance, and at least twenty-eight states have *specific* laws relating to the treatment of underwater archaeological resources (i.e. shipwrecks). *See* H.R. Rep. No. 514, 100th Cong., 2d Sess., Pt. 2, at 2 (1988).

Congress recognized the significance of historic shipwreck sites by its passage of the Abandoned Shipwreck Act of 1987. The ever increasing morass of conflicts that we witness today is very similar to the motivation that drove Congress to pass the Abandoned Shipwreck Act. The House stated, in its Legislative History of the ASA, that the litigation prior to 1987, "led to the confusion over the ownership of, and responsibility for, historic shipwrecks in state waters. This confusion led to the [ASA]." H.R. Rep. No. 514, 100th Cong., 2d Sess., Pt. 2, at 2 (1988). The Senate Report stated,

> As new technologies have allowed the recovery of wrecks that have been lost for long periods of time, a new concern has been developed for the historic and recreational interests in shipwrecks, shipwrecks are no longer viewed as only lost commercial resources that should be salvaged so that the goods can be returned to commerce. Rather, many shipwrecks are . . . viewed as invaluable and irreplaceable archaeological resources.

S. Rep. No. 241, 100th Cong., 1st Sess. 6 (1987), *reprinted in* 1988 U.S.C.C.A.N. 365. Congress estimated that there

were nearly *fifty thousand abandoned shipwrecks* beneath the navigable waters of the United States and situated on state submerged lands. H.R. Rep. Nos. 100-514(I) and 100-514(II), 1988 U.S.C.C.A.N. at 365, 370. If abandonment of long lost and forgotten historic shipwrecks requires after-the-fact formal authorization by the United States or a foreign sovereign, we will find that *none* of our . . . "invaluable and irreplaceable archaeological resources" were ever "abandoned" and they never will be!

Unless this Court dictates a coherent national and uniform legal standard of "implied abandonment" for property lost at sea, the admiralty courts of the United States will have seen their last *In Rem* salvage of long lost historic vessels and the management of the underwater cultural heritage of this country (by the states under the ASA) and the judicial discretion of our admiralty courts under salvage law will be at an end.

II.

THE "EXPRESS ABANDONMENT" STANDARD IMPROPERLY CONFUSES LAND BASED LAW AND ADMIRALTY LAW.

In Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975 Section 8-1), there is an observation that,

> on land, the person who rushes in to save another person's property from danger is an officious intermeddler, the volunteer, whom even equity will not aid. He has no right to a reward, although he may incur liability if he damages the property in the course of saving it . . . At sea, the person who saves property receives a reward which is generously computed in light of fundamental public policy at the basis of awards of salvage. . . .

Flagship Marine Services, Inc. v. Belcher Towing Company, 761 F. Supp. 792 (S.D. Fla. 1991).

The fundamental divergence of opinion within the Circuits has, at its root, an analysis of "abandonment" that looks to land based legal principles and fails to recognize the completely divergent purpose of land based law v. admiralty law. In a land based property dispute, the only issue subject to litigation is "ownership". In a maritime setting involving the voluntary recovery of property from maritime peril, the maritime lien against the property is the primary issue before the admiralty court. The issue of "ownership" is secondary and is raised by subsequent intervening claimants. The intervenor's claim of "ownership" in a salvage action and the Plaintiff/Salvor's defense of "abandonment" to an ownership claim, are factual issues most of which are involved in the admiralty court's determination of a proper salvage award.

Under the land based standard of abandonment, there must be a voluntary relinquishment by the owner of all right, title, claim and possession to the property along with the intention of terminating ownership, but without vesting the property in any particular person. *See* 1 Am. Jur. 2d "Abandoned, Lost and Unclaimed Property", Section 1. Accordingly, on land there is no abandonment even if the owner of the property is unaware of its continued existence. Most, if not all, of the circuits using the "express abandonment" standard, cite to this Court's decision in *United States v. California*, 332 U.S. 19 (1947), a case involving sovereign oil rights beneath sovereign submerged lands. (App. A at 15a). In the *California* case, this Court stated:

> The government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and

> officers who have no authority at all to dispose of government property cannot by their conduct cause the government to lose its valuable rights by their acquiescence, laches or failure to act. Id. 332 U.S. at 40.

The circuit courts, using some form of "express abandonment" standard, go on to conclude that the United States Constitution, Article IV, Section 3, Clause 2 (PUBLIC LANDS) requires not only an affirmative act on the part of the federal government, but authorization by Congress before there can be an adjudication of a "sovereign abandonment". (App. A at 14a). The Circuit's, using the "express abandonment" standard from *United States v. California* and the "PUBLIC LANDS" Clause of our Constitution, are failing to recognize the fundamental policy underlying admiralty and maritime law applicable to maritime salvage. Returning the salvaged property to the streams of commerce in the most beneficial way to the public (including preservation of historical and archaeological information and artifacts) is the task of the admiralty courts under their constitutional exclusive jurisdiction mandated by Article III, Section 2 of our Constitution. *See Henner v. United States*, 525 F. Supp. 350, 356 (S.D. N.Y. 1981); *Platoro Ltd., Inc. v. The Unidentified Remains of a Vessel*, 518 F. Supp. 816, 819 n.1 (W.D. Tex. 1981); *Indian River Recovery, Co. v. The China*, 645 F. Supp. 141, 144 (D. Del. 1986). The primary concern of admiralty law is the preservation of life and property on our oceans and waterways. The primary concern of salvage law is to put a voluntary salvor in the position of having the admiralty court take jurisdiction and possession of personal property (i.e. vessels, equipment and cargo) for the purpose of saving it from maritime peril (i.e. destruction, damage or loss). The admiralty court maintains its exclusive jurisdiction and possession over the salvaged property and protects the salvage activities until the *res* is saved from destruction and the maritime salvage lien has been satisfied.

III.

THE MARITIME LAW OF FINDS DOES NOT REPLACE THE LAW OF SALVAGE, IT "SUPPLEMENTS" IT.

Maritime salvage liens are satisfied *from* the rescued property, *not* from assets of the original owner of the property. If, after publication, no original owner intervenes as a claimant, or, if the original owner intervenes and the courts finds (on the basis of all the facts and circumstances) that the *res* was abandoned by the original owner, then and only then, is the *maritime* Law of Finds utilized. It is used to *supplement* the Law of Salvage, not "replace" it. The confusion in many of our admiralty courts is treating the land based "Law of Finds" as a "replacement" for the "Law of Salvage". (App. B at 45a). In a maritime setting, the only time the Law of Finds can be used by the admiralty court is to award title to a salvor when no owner appears or when the court finds that the original owner abandoned the property. The maritime Law of Finds does not change the character of the action. The nexus of confusion within the Circuits is that the "square peg" of the land based Law of Finds has been diligently pounded into the "round hole" of salvage law.

IV.

DETERMINATION OF MARITIME ABANDONMENT MUST BE A MATTER OF JUDICIAL DISCRETION.

It should now be painfully apparent that maritime abandonment must be factually determined by the admiralty court on the basis of *all* of the facts and circumstances in each case. There can be no "bright line" test of abandonment. The circumstances of the original loss, the degree of maritime peril, the knowledge of the parties, the time periods involved, the availability of technology allowing search and recovery,

the relation of the present intervenor claiming ownership to the original owner, and even the probable vs. possible identification of a vessel, *all* of these are variables that not only determine "abandonment", but the admiralty court's proper adjudication of the salvage award. The Constitution "trusted" the judicial discretion of our admiralty courts to make these decisions on a case-by-case basis. Shouldn't we?

Justice Washington observed in *United States v. Bright*, 24 F. Cas. 1232, 1236 (C.C. Pa. 1809), that, "This was not a suit at law or in equity, but in a court of the law of nations, and in a case of admiralty and maritime jurisdiction." Justice Washington realized the danger to an *In Rem* Defendant if a sovereign owner was allowed to come forward to defeat a salvor's maritime claim. As Justice Washington stated:

> But if a latent claim in the state not known, perhaps, by any of the litigant parties, is sufficient to oust the jurisdiction, to annul the judgment when rendered, and to effect all the parties concerned with the consequences of carrying a void judgment into execution, the federal courts may become more than useless; they will be traps in which unwary suitors may be ensnared to their ruin.

In most of the *In Rem* salvage actions involving historic vessels, the voluntary salvors spend years researching and exploring in order to discover wrecksites of vessels that were lost and forgotten by their original owner. In order to file an *In Rem* salvage action, the salvor's research and knowledge of the existence of the wrecksites and their location must, of necessity, be revealed to the admiralty court. All of this information must be publicly advertised in order to invoke the admiralty court's exclusive jurisdiction and secure the admiralty court's protection of the salvage activities from

interference by third parties. Intervention by those who purport to be the original owners is not only allowed, but encouraged. What is most important is that the admiralty court's initial decision does *not* involve any ownership issues, but whether a maritime peril exists (and/or existed), whether the salvage is (and/or was) voluntarily rendered and whether it was (or has the probability of being) successful. This initial decision results in a maritime lien against which no sovereign intervenor claiming ownership is immune and/or exempt. To allow a sovereign intervenor claiming ownership, to appropriate the Plaintiff/Salvor's research, location and salvage recoveries in such circumstances would, as Justice Washington feared, make the admiralty courts "more than useless; they will be traps, in which unwary suitors may be ensnared to their ruin."

By the time a Plaintiff/Salvor publishes notice of the *In Rem* arrest and the Intervenor claiming ownership appears, a salvage service has *already* been performed and a maritime lien created. In *Ta Chi Navigation (Panama) Corp. S.A., et al. v. M/V "Eurypylus", et al.*, 583 F. Supp. 1322, 1328 (S.D.N.Y. 1984) and *B.V. Bureau Wijsmuller v. United States*, 702 F.2d 333, 338 (2nd Cir. 1983), the Courts held that in order to recover a traditional salvage award, a salvor must prove maritime peril, voluntary service and success in whole or in part . . . "with the service rendered having contributed to such success". In *Ta Chi Navigation*, the master of a burning ship used the communications facilities of another ship to send messages "to the owners advising them of the disaster to their vessel, its location at the time of the disaster and when it was last observed". *Id.* 583 F. Supp. at 1334. The court found that the vessel providing the communication of the location "is entitled to a property salvage award for forwarding reports by the master of the Eurypylus [the burning vessel] to her owner since this furthered the ultimate property salvage." *Id.* 583 F. Supp. at 1335.

Informing a sovereign intervenor claiming ownership of the research, identification and location of the wrecksite of a vessel lost to a watery grave hundreds of years ago *is* a salvage service creating, at a minimum, a maritime lien. This maritime lien cannot be "extinguished" by a sovereign intervenor claiming ownership and denying further salvage services! There is *no* sovereign immunity under such circumstances. *Deep Sea Research*, 523 U.S. at 507. Once salvage services commence, compensation is owed even if the owner *properly* orders such services to cease. *The Manchester Brigade*, 276 F. 410, 413 (E.D. Va. 1921); *The Eastern Glen*, 11 F. Supp. 995, 1000 (S.D.N.Y. 1935).

Justice Bradley of this Court pointed out that . . . "salvage is a question of *jus gentium*" and that salvage comes . . . "within the domain of the general law of nations . . . and are prima facie proper subjects of inquiry in any court of admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious or injured parties." *The Belgenland v. Jensen*, 114 U.S. 355, 362 (1885). The applicable law is "the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted." *Id.* 114 U.S. at 369.

The traditional purpose of salvage is inextricably intertwined with the admiralty court's judicial discretion and liberal application of principles of equity. This traditional purpose of our admiralty courts cannot be served without a full examination of the facts and circumstances of each salvage claim. In the context of an intervening sovereign claiming ownership, the requirement that a salvor show "express abandonment" in order to be entitled to a maritime lien forbids the presentation of the facts and circumstances of each salvage action and, by doing so, forbids the admiralty court's application of equitable principles. If an idle and long-absent sovereign "owner" of long-lost property is allowed

to intervene and oust the traditional fact-finding of the admiralty court, there will be no evidence upon which a proper salvage award can be determined, and if future salvage services are rejected, there is no way the existing maritime lien can be satisfied. Justice is being led into a blind alley from which she will never return — without this Court's help.

In *W.E. Rippon & Son v. United States*, 348 F.2d 627, 628-29 (2nd Cir. 1965) the Circuit Court cited the historical guidelines for a salvage award that this Court laid down in *The Blackwall*, 77 U.S. 1, 14 (1870). Under these guidelines, the admiralty court must determine the degree of danger (maritime peril) from which the property was rescued, the value of the property, the risk incurred (including the value of the property employed by the salvor and it's exposure to loss) and the labor, promptitude and skill of the salvor. In *Rippon*, the court concluded that a salvage award was *totally a matter of judicial discretion* stating that:

> Adequate yardsticks are peculiarly lacking in determining salvage. In search of a formula for doing equity and at the same time not departing from the laws predisposition to be controlled by precedent, the result reached by that most famous Biblical Judge, Solomon, may well supply the guide. Id. 348 F.2d at 630.

The confusion in the Circuits as to any national standard of abandonment confirms that no "adequate yardstick" exists. If a salvage award is a matter of judicial discretion, how can "abandonment" be anything else? If the Fourth Circuit's decision in *Sea Hunt* (App. A) and the Eleventh Circuit's decision in *International Aircraft* are allowed to stand, the admiralty courts will be transformed from the salvor's exclusive sanctuary of justice into the "trap" which Justice Washington feared.

V.

THE DECISION OF THE COURT OF APPEALS REQUIRES A POTENTIAL SALVOR TO DETERMINE "OWNERSHIP" OF THE PROPERTY IN MARITIME PERIL PRIOR TO RENDERING VOLUNTARY SALVAGE SERVICES.

A voluntary salvor who finds property in maritime peril has *never*, prior to this time, been required to seek "permission" to remove the property from maritime peril. To require a salvor to determine "ownership", and then seek "permission", is in direct contravention of traditional admiralty and maritime principles. If allowed to stand, the *Sea Hunt* decision (App. A) will result in a lack of uniformity with the exclusive jurisdiction of the United States Admiralty Courts by requiring that every *In Rem* salvage action proceed on *In Personam* principles. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Chelentis v. Luckenbach, S.S. Co.*, 247 U.S. 372 (1918). In *Southern Pacific Co. v. Jenson*, 244 U.S. 205 (1917), this Court stated that the "fundamental purpose" of the Constitution, Article III, is to "preserve adequate harmony and appropriate uniform rules relating to maritime matters."

There are only three (3) elements of a valid salvage claim: a marine peril, services voluntarily rendered and success in whole or in part. *Legnos v. M/V Olga Jacob*, 498 F.2d 666 (5th Cir. 1974). The "express abandonment" standard espoused by the Fourth Circuit in *Sea Hunt*, (App. A) and the Eleventh Circuit in *International Aircraft*, adds two additional elements in order to "perfect" a maritime salvage lien. First, the determination of the ownership of the property and second, a decision from the owner as to whether salvage services will be allowed to proceed. There could be no criteria more antagonistic to the underlying purpose of salvage, than to add inflexible *In Personam* requirements to an *In Rem* salvage action.

In this Courts decision in *United States v. 422 Cases of Wine*, 26 U.S. 547, 549 (1828), Justice Story set out the error in requiring an *In Rem* Plaintiff to carry the burden of proof on refuting the ownership clam of an intervenor:

> This objection is founded upon the mistaken view of the time, nature and order of the proceedings proper in suits *In Rem* . . . in such suits, the [intervenor] claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party, ad litem, capable of sustaining the litigation.

Putting a potential intervenor's ownership (and permission) *before* a judicial determination of an *In Rem* maritime lien is clearly contrary to traditional admiralty and maritime principles.

Two hundred fifty years ago, the Governor of Maryland stopped the looting of the *La Galga* and assisted the salvage efforts of the Spanish Captain until ". . . salvage efforts ended when a second storm came and broke up what was left of the ship". (App. A at 6a). When Sea Hunt found the wrecksite of a wrecked and (apparently) abandoned vessel and commenced salvage, a maritime lien arose. The admiralty court must be allowed to consider *all* of the facts and circumstances to determine a proper salvage award, ownership and whether the property was abandoned (i.e. judicial discretion on a case-by-case basis). The "express abandonment" standard applied to the ownership claim of an intervening sovereign does not even consider, much less address, the necessity of actual possession by the sovereign

in order to avoid a direct *In Rem* salvage proceeding. The "express abandonment" standard used by the District and Circuit Court in *Sea Hunt* has invalidated Sea Hunt's maritime lien and denied Sea Hunt's salvage award! (App. A at 27a). Why should any salvor risk his effort, ingenuity and expense, not to mention life and limb, to aid property in maritime peril if, at any time, an intervening sovereign claimant can appear and refuse a maritime lien on the basis that the salvage was without "formal authorization by the government of Spain."? (App. A at 8a).

VI.

THERE IS A NEED FOR UNIFORM PROCEDURES *AND* JUDICIAL DISCRETION.

A primary and fundamental point that this Court must address is the uniform *procedure* the admiralty courts *must* use when an intervenor (sovereign or private) appears claiming ownership *and* seeking an injunction prohibiting further salvage. When this occurs, the admiralty court must then adjudicate whether the ownership claim is, or may be, valid as part of it's decision on the injunction. The maritime lien, the salvage award, the ownership claim and the "abandonment" defense are all factual matters of judicial discretion to be determined on a case-by-case basis. Once an admiralty court finds a valid ownership claim exists, the admiralty court must continue its inquiry to determine if an owner, who is seeking to terminate salvage services, has made adequate provision to mount a timely effort to save the *In Rem* Defendant from its maritime peril. If an intervening owner wishes to mount a timely effort to save the *In Rem* Defendant from its maritime peril and terminate future voluntary salvage services, the admiralty court, using its equitable powers and factual inquiry into all of the circumstances must determine whether future salvage rights

of the voluntary salvor must be terminated, and if so, what an appropriate salvage award will be. It is vitally important that this Court take note of the fact that in a vast majority of the salvage cases, the issue of ownership will *only* become a factor in the admiralty court's determination of a proper salvage award.

In *Knickerbocker Ice Co. v. Steward*, 253 U.S. 149, 163-164 (1920), this Court prohibited Congress from passing laws that would sanction the destruction of the Constitutionally prescribed uniformity of the Federal Admiralty Courts. Along with the federal courts' Constitutionally delegated exclusive jurisdiction in admiralty and maritime claims, there is the requirement of *consistency* throughout the admiralty courts. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217 (1917). Unless this Court grants the Writ and reviews the Fourth Circuit's decision in *Sea Hunt* and/or the Eleventh Circuit's decision in *International Aircraft*, future litigants will make selections of their forums based on whichever theory of abandonment, (i.e. implied or express) suits their purpose. Litigants are now actually resorting to "evidence shopping" as well as "forum shopping", since the procedure and even the standard/burden of proof to establish ownership and/or abandonment is not consistent within the Circuits. To carry out the Constitutional mandates of the admiralty courts, this Court must immediately assume control and bring both logic and uniformity back into this area of exclusive federal jurisdiction.

The "express abandonment" standard is effectively putting an end to salvage law and the Abandoned Shipwreck Act. With no abandonment of a wrecksite lost and forgotten for many, many years (absent a showing by the Plaintiff/ Salvor of an after-the-fact express declaration renouncing title) owners have no incentive *whatsoever* to do anything to reclaim their valuables. Owners (private and sovereign) can

sit idly by to see if a salvor with the funding energy and expertise to conduct salvage operations will go out and locate their property for them. Once the voluntary salvor has found the *res* in maritime peril, and commenced salvage operations to remove it from its maritime peril, the "owner" must merely intervene and state that there was never any "affirmative action" to abandon or any "intent" to abandon. Why would any voluntary salvor undertake salvage under such circumstances? Under a rational common-sense analysis, the "express abandonment" standard begins to crumble, just as many *In Rem* Defendants are crumbling beneath the navigable waters of our United States.

CONCLUSION

The actions of the United States government in these proceedings were absolutely and totally arbitrary, not like the institution that we created to serve us. First, the United States Department of Justice(representing the National Park Service) attempted intervention to "regulate activities" that were under the Admiralty Court's exclusive jurisdiction. (App. D at 78a). Because the Abandoned Shipwreck Act had exercised the sovereign prerogative of the United States by claiming certain abandoned ships and conveying them to the state's within which they may be found, the United States had no claim with respect to ownership or salvage rights and its attempt to interfere and regulate the salvage activities was dismissed. (App. D at 79a). Having failed in that attempt, the attorneys in our Department of Justice sought to intervene in order to assert Spain's ownership claim. The trial court observed, "The United States takes the unique position in this case of holding itself out as counsel for Spain." (App. C at 62a). Again, the United States Department of Justice was denied intervention under the guise of "acting as attorney on behalf of the Kingdom of Spain." (App. C at 72a). Finally, under the active assistance and

urging of the "Department of Justice", the United States assisted the Kingdom of Spain and its private attorneys in their claim to all wrecksites of vessels within the United States that were once owned by Spain. (App. B at 37a). The actions of our "United States Department of Justice" and the decisions of the Courts below (urged by the Department) have provided Spain with "sovereign immunity" to *In Rem* salvage claims on wrecksites of long lost, buried and forgotten Spanish vessels. The actions of the Department of Justice, representing the National Park Service, have eviscerated the Abandoned Shipwreck Act and the protection of our country's historical and archaeological maritime heritage. When the actions of individuals within the United States Department of Justice are analyzed in the context of the *Sea Hunt* and *International Aircraft* decisions, we must finally come to the conclusion that our bureaucratic crew is so busy playing procedural hymns, that like the band on the deck of the *Titanic*, it has given up trying to get anywhere.

A conflict among the circuits on an important legal issue can always be problematic, but it is especially troublesome when it occurs in admiralty where uniformity has been the consistent rule. In this case, it is even more urgent when the conflict causes some salvors and some States of the Union to be denied benefits that other states continue to enjoy. Such a troublesome and urgent conflict has arisen on the issue of ownership/abandonment. This conflict must be resolved as soon as possible and resolved in a manner that gives the salvors and the States the full benefit of our admiralty laws' implied abandonment standard. Entrusting our admiralty courts with the judicial discretion to determine abandonment on a case-by-case basis was contemplated by this Court in *Deep Sea Research* and it is the only way the Abandoned Shipwreck Act *and* the *In Rem* salvage jurisdiction of our admiralty courts can remain viable. The Petition for Writ of Certiorari must be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED JULY 21, 2000

United States Court of Appeals,
Fourth Circuit.

SEA HUNT, INCORPORATED,

Plaintiff-Appellee,

and

Commonwealth of Virginia,

Intervenor-Appellee,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, Their Apparel, Tackle, Appurtenances, and Cargo Located within Coordinates 38 Degrees 01' 36" North Latitude, 75 Degrees 14' 33" West Longitude; 37 Degrees 57' 21" North Latitude, 75 Degrees 13' 00" West Longitude; 38 Degrees 01' 36" North Latitude, 75 Degrees 13' 14" West Longitude; 37 Degrees 57' 33" North Latitude, 75 Degrees 17' 44" West Longitude and/or 37 Degrees 55' 00" North Latitude, 75 Degrees 19' 18" West Longitude; 37 Degrees 54' 09" North Latitude, 75 Degrees 17' 00" West Longitude; 37 Degrees 51' 21" North Latitude, 75 Degrees 18' 52" West Longitude; 37 Degrees 52' 20" North Latitude, 75 Degrees 21' 05" West Longitude, in rem,

Defendant,

Appendix A

Kingdom of Spain,

Claimant-Appellant,

and

Commonwealth of Virginia, ex rel William A. Pruitt, Commissioner of Marine Resources and Chairman of the Virginia Marine Resources Commission; Alpha Quest Corporation; Richard L. Cook, an individual resident of Ocean City, Maryland,

Claimants,

and

United States of America; Columbus-America Discovery Group; Salvors, Incorporated; Cobb Coin Company, Incorporated; Intersal, Incorporated; Enterprise Marine, Incorporated; Quicksilver, Incorporated; Deep Sea Research, Incorporated; State of North Carolina,

Amici Curiae.

Sea Hunt, Incorporated,

Plaintiff-Appellant,

and

Commonwealth of Virginia,

Intervenor-Plaintiff,

v.

Appendix A

The Unidentified Shipwrecked Vessel or Vessels, Their Apparel, Tackle, Appurtenances, and Cargo Located Within Coordinates 38 Degrees 01' 36" North Latitude, 75 Degrees 14' 33" West Longitude; 37 Degrees 57' 21" North Latitude, 75 Degrees 13' 00" West Longitude; 38 Degrees 01' 36" North Latitude, 75 Degrees 13' 14" West Longitude; 37 Degrees 57' 33" North Latitude, 75 Degrees 17' 44" West Longitude and/or 37 Degrees 55' 00" North Latitude, 75 Degrees 19' 18" West Longitude; 37 Degrees 54' 09" North Latitude, 75 Degrees 17' 00" West Longitude; 37 Degrees 51' 21" North Latitude, 75 Degrees 18' 52" West Longitude; 37 Degrees 52' 20" North Latitude, 75 Degrees 21' 05" West Longitude, in rem,

Defendant,

Kingdom of Spain,

Claimant-Appellee,

and

Commonwealth of Virginia, ex rel William A. Pruitt, Commissioner of Marine Resources and Chairman of the Virginia Marine Resources Commission; Alpha Quest Corporation; Richard L. Cook, an individual resident of Ocean City, Maryland,

Claimants,

and

Appendix A

United States of America; Columbus-America Discovery Group; Salvors, Incorporated; Cobb Coin Company, Incorporated; Intersal, Incorporated; Enterprise Marine, Incorporated; Quicksilver, Incorporated; Deep Sea Research, Incorporated; State of North Carolina,

Amici Curiae.

Nos. 99-2035, 99-2036.

Argued May 1, 2000
Decided July 21, 2000

* * *

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge LUTTIG and Judge MICHAEL joined.

OPINION

WILKINSON, Chief Judge:

This in rem admiralty action concerns the sovereign rights of the Kingdom of Spain to two of its Royal Naval vessels, LA GALGA and JUNO, which were lost off the shores of present-day Virginia in 1750 and 1802 respectively. Pursuant to the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. § 2101-06 (1994), Virginia has asserted ownership

over the shipwrecks and has issued Sea Hunt permits to conduct salvage operations and recover artifacts from the wrecks. These efforts resulted in the discovery of two wrecks believed to be LA GALGA and JUNO. Sea Hunt filed an in rem admiralty complaint, and the district court ordered an arrest of the shipwrecks, appointing Sea Hunt the exclusive salvor. Spain filed a verified claim asserting ownership over the shipwrecks. The district court found that Spain retained title to JUNO, but had expressly abandoned LA GALGA in the 1763 Definitive Treaty of Peace. See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 47 F.Supp.2d 678 (E.D.Va.1999). The district court also denied Sea Hunt a salvage award.

As sovereign vessels of Spain, LA GALGA and JUNO are covered by the 1902 Treaty of Friendship and General Relations between the United States and Spain. The reciprocal immunities established by this treaty are essential to protecting United States shipwrecks and military gravesites. Under the terms of this treaty, Spanish vessels, like those belonging to the United States, may only be abandoned by express acts. Sea Hunt cannot show by clear and convincing evidence that the Kingdom of Spain has expressly abandoned these ships in either the 1763 Treaty or the 1819 Treaty of Amity, Settlement and Limits, which ended the War of 1812. We therefore reverse the judgment of the district court with regard to LA GALGA, and affirm the judgment of the district court concerning JUNO and the denial of a salvage award.

Appendix A

I.

LA GALGA ("The Greyhound") was a fifty-gun frigate commissioned into the Spanish Navy in 1732. LA GALGA left Havana on its last voyage on August 18, 1750, in order to escort a convoy of merchant ships to Spain. It carried the Second Company of the Sixth Battalion of Spanish Marines, Spanish Royal property, and English military prisoners. On August 25, 1750, the convoy encountered a hurricane near Bermuda that scattered the ships and forced them westward toward the American coast. LA GALGA eventually sank off the coast of the Maryland/Virginia border. Most of the crew and passengers reached land safely. When Captain Daniel Houny attempted to salvage items from the wreck, he found that local residents had already begun looting the vessel. He secured the assistance of Governor Ogle of Maryland, but any further salvage efforts ended when a second storm came and broke up what was left of the ship. LA GALGA remained undisturbed until the recent salvage efforts by Sea Hunt.

The JUNO, a thirty-four gun frigate, entered the service of the Spanish Navy in 1790. On January 15, 1802, JUNO set sail from Veracruz bound for Spain. On board JUNO were the soldiers of the Third Battalion of the Regiment of Africa, their families, and various civilian officials. The JUNO was beset by a ferocious storm and began taking on water. It encountered the American schooner LA FAVORITA. The two ships sailed together trying to reach an American port before JUNO succumbed to her leaks. As JUNO continued to take on water, the Captain ordered his passengers and crew to begin transferring to LA FAVORITA. But only seven persons were able to transfer before the storm picked up and

JUNO was lost in a heavy fog. LA FAVORITA could come close enough only to hear the anguished cries for help as JUNO went under. At least 413 sailors, soldiers, and civilians perished in the sinking of JUNO. Spanish authorities ordered an investigation into the sinking, but the location of the wreck was not discovered until Sea Hunt's recent efforts.

The Commonwealth of Virginia has asserted ownership over LA GALGA and JUNO pursuant to the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. §§ 2101-06 (1994). The ASA gives states title to shipwrecks that are abandoned and are embedded in the submerged lands of a state. See id. § 2105(a) & (c). Sea Hunt is a maritime salvage company based in the Eastern Shore of Virginia. The Virginia Marine Resources Commission granted Sea Hunt permits to explore for shipwrecks off the Virginia coast and conduct salvage operations. Sea Hunt began to explore for shipwrecks within its permit areas and has spent about a million dollars in conducting remote sensing, survey, diving, and identification operations. Sea Hunt claims that its efforts have resulted in finding the remains of LA GALGA and JUNO.

To avoid interference with its operations, Sea Hunt initiated an in rem admiralty action against the two wrecks on March 11, 1998. Sea Hunt sought a declaratory judgment that the shipwrecked vessels "have never been subject to the sovereign prerogative of the Kingdom of Spain and [are] subject to admiralty's laws of abandonment and the law of finds," that "the Commonwealth of Virginia be adjudged the true, sole and exclusive owner of the Shipwrecked Vessel(s)," and that any items salvaged therefrom by Sea Hunt be distributed pursuant to the permits issued by Virginia. In

the alternative, Sea Hunt sought a liberal salvage award for its efforts. On March 12, 1998, the district court issued an order directing the arrest of the shipwrecked vessels and granting Sea Hunt exclusive rights of salvage until further notice. The court also directed Sea Hunt to send specific notice of the action to both the United States and to Spain.

In response, the United States moved to intervene and filed a verified claim on behalf of Spain. The district court found that the United States lacked authority to appear on behalf of Spain and granted Spain 90 days to refile a verified claim. See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 22 F.Supp.2d 521, 526 (E.D.Va.1998). Spain's verified claim stated that the Kingdom of Spain "was and still is the true and bona fide owner of the vessels JUNO and LA GALGA . . . and that title and ownership interest in said vessels has never been abandoned or relinquished or transferred by the Kingdom of Spain." Spain put forth affidavits and exhibits showing that at the time of their sinking both ships were serving as vessels of the Royal Navy, that both vessels are currently on the register of the Spanish Navy, and that transfer or abandonment of the vessels would require formal authorization by the government of Spain.

On April 27, 1999, the district court found that the express abandonment standard applied to these shipwrecks and that Spain had abandoned its claim to LA GALGA under Article XX of the 1763 Definitive Treaty of Peace between France, Great Britain and Spain. See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 47 F.Supp.2d 678, 690 (E.D.Va.1999). It further found that Spain did not expressly abandon JUNO in the 1819 Treaty ending the

conflict between Spain and the United States stemming from the War of 1812. See id. In a later decision the district court held that Sea Hunt could not rightfully claim a salvage award because Spain, as the acknowledged owner of JUNO, had expressly refused salvage services. The Kingdom of Spain now appeals the judgment concerning LA GALGA. The Commonwealth and Sea Hunt note a cross-appeal with regard to JUNO and the denial of a salvage award.

II.

In order for Virginia to acquire title to the shipwrecks and to issue salvage permits to Sea Hunt, these vessels must have been abandoned by Spain. Sea Hunt and the Commonwealth argue that the Abandoned Shipwreck Act requires application of an implied abandonment standard for shipwrecks in coastal waters, and that Spain has abandoned LA GALGA and JUNO. Because Spain has asserted an ownership claim to the shipwrecks, however, express abandonment is the governing standard. See Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450, 464-65 (4th Cir.1992). To adopt a lesser standard would not only go beyond what the ASA requires. It would also abrogate America's obligations to Spain under the 1902 Treaty of Friendship and General Relations.

A.

Under the ASA, the United States asserts title to any abandoned shipwreck that is on or embedded in the submerged lands of a State. See 43 U.S.C. § 2105(a). Title is then automatically transferred to the State in whose

submerged lands the shipwreck is located. See id. § 2105(c). "Submerged lands" for the purposes of the ASA includes coastal waters three miles from shore. Id. § 2102(f)(1), § 1301(a)(2). For a state to acquire title to a shipwreck it must be (1) abandoned and (2) on or embedded in the submerged lands of a state. Id. § 2105(a) & (c). It is undisputed that LA GALGA and JUNO are within Virginia's submerged lands. That, however, is not enough. We must address whether these frigates were abandoned by Spain. If the shipwrecks were abandoned, then Sea Hunt would have control over them in accordance with its state-issued permits.

The ASA does not define the critical term "abandoned." Nothing in the Act indicates, however, that implied abandonment should be the standard in a case such as this where a sovereign asserts ownership to its vessels. The Act states in its findings that "abandoned shipwrecks" are those "to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101(b). The statute thus provides that a shipwreck is abandoned only where the owner has relinquished ownership rights. When an owner comes before the court to assert his rights, relinquishment would be hard, if not impossible, to show. Requiring express abandonment where an owner makes a claim thus accords with the statutory text. Further, although the legislative history states that abandonment may be implied, it may be implied "as by an owner never asserting any control over or otherwise indicating his claim of possession." H.R.Rep. No. 100-514(I), at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 365, 366. An owner who comes forward has definitely indicated his claim of possession, and in such a case abandonment cannot be implied.

Appendix A

The legislative history of the ASA suggests that sovereign vessels must be treated differently from privately owned ones. The House Report incorporates a State Department letter, which states, "the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment." H.R.Rep. No. 100-514(II), at 13 (1988), reprinted in 1988 U.S.C.C.A.N. at 381. The implications of this for other sovereign vessels is also underscored: "[T]he same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State." Id. Under the ASA, then, an implied abandonment standard would seem least defensible where, as here, a nation has stepped forward to assert ownership over its sovereign shipwrecks.

B.

Further, courts have held that the ASA "did not affect the meaning of 'abandoned,' which serves as a precondition for the invocation of the ASA's provisions." Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel, 177 F.3d 491, 499 (6th Cir.1999). According to the Supreme Court, "the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." California v. Deep Sea Research, Inc., 523 U.S. 491, 508, 118 S.Ct. 1464, 140 L.Ed.2d 626 (1998). The Supreme Court never suggested that by conferring title to the states the ASA somehow altered the traditional admiralty definition of abandonment. While the common law of admiralty must be developed consonant

with federal statutes, see American Dredging Co. v. Miller, 510 U.S. 443, 455, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), here the ASA has not altered the admiralty law background.

Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts. See Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450 (4th Cir.1992). "[S]hould an owner appear in court and there be no evidence of an express abandonment," title to the shipwreck remains with the owner. Id. at 461. This principle reflects the long standing admiralty rule that when "articles are lost at sea the title of the owner in them remains." The Akaba, 54 F. 197, 200 (4th Cir.1893). When "a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment." Columbus-America, 974 F.2d at 467-68; see also Fairport, 177 F.3d at 498; Hener v. United States, 525 F.Supp. 350, 356- 57 (S.D.N.Y.1981). An inference of abandonment is permitted, but only when no owner appears. See Columbus-America, 974 F.2d at 464-65 ("Should the property encompass an ancient and long lost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest. . . .").

Appellees point us to no case applying an implied abandonment standard where a sovereign owner has come forward to assert a claim to its property. Although Sea Hunt and the Commonwealth characterize the rule of Columbus-America as an anomaly, it reflects well-established admiralty law doctrine and existing case law. For instance, in Fairport

the Sixth Circuit adopted a test of "inferential abandonment." It emphasized, however, that there is a "uniform concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will." 177 F.3d at 499; see also id. at 500 ("Proof by inference still requires proof, not conjecture — a requirement bolstered by the exacting burden of proof admiralty law imposes on those who allege abandonment."). The Sixth Circuit also expressly limited its holding to "vessels formerly owned by private parties, and express[ed] no view as to the application of the express abandonment test to vessels initially owned by the United States." Id. at 500.

The First and Fifth Circuits have also never suggested that an implied abandonment standard would govern in a case involving a claim by an original owner to its property. See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065 (1st Cir.1987) (emphasizing that "no person or firm appeared to assert any overall claim of ownership"); Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 567 (5th Cir.1981) (noting that "salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor, except in extraordinary cases"). Appellees' attempts to glean a broad implied abandonment standard from circuit law overlooks one salient point — none of the cases they rely upon involved an original sovereign owner's claim to its shipwrecked vessels. To adopt an implied abandonment standard in this context would casually divest sovereigns of ships which sank against their will and to which they still lay claim.

Appendix A

C.

Finally, the express abandonment standard is required by Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain. Article X provides, "In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases." Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, 33 Stat. 2105. According to the United States Department of State, "this provision is unique" in that no other "friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded provision applying to State ships entitled to sovereign immunity." Statement of Interest, U.S. Dep't of State, ¶ 13 (Dec. 18, 1998). This treaty requires that imperiled Spanish vessels shall receive the same immunities conferred upon similarly situated vessels of the United States.

United States vessels may only be abandoned by an express, unambiguous, and affirmative act. Article IV of the Constitution states, "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3. From this it follows that the Constitution precludes a finding of implied abandonment of federal lands and property — dispositions of federal property require some congressional action. "[T]he United States cannot abandon its own property except by explicit acts." See United States v. Steinmetz, 973 F.2d 212, 222 (3d Cir.1992). The Supreme Court has emphasized that the

United States cannot be precluded from asserting its ownership rights by private property "principles similar to laches, estoppel or adverse possession." United States v. California, 332 U.S. 19, 39-40, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947). The government "holds its interests here as elsewhere in trust for all the people," and thus cannot relinquish its property without express acts. Id. at 40, 67 S.Ct. 1658. The House Report for the ASA also relates the understanding that "U.S. warships and other public vessels . . . require an affirmative act of abandonment." H.R.Rep. No. 100-514(II), at 5 (1988), reprinted in 1988 U.S.C.C.A.N. at 374. Thus, one of the immunities granted to United States vessels is that they will not be considered abandoned without a clear and affirmative act by the government.

Under the terms of the 1902 Treaty, Spanish vessels can likewise be abandoned only by express renunciation. Both Spain and the United States agree that this treaty provision requires that in our territorial waters Spanish ships are to be accorded the same immunity as United States ships. They also agree that such immunity requires application of the express abandonment standard. "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." See Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982). We cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities.

Applying the express abandonment standard to sovereign vessels also respects the legitimate interests of the executive branch. While the ASA confers title to abandoned shipwrecks to the states, it does not vitiate important national interests or undermine the well-established prerogatives of sovereign nations. Department of Interior advisory guidelines on the ASA state that a sovereign vessel that appears to have been abandoned "remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party." 55 Fed.Reg. 50116, 50121 (1990). The State Department has likewise emphasized that its policy is "to recognize claims by foreign governments — such as in this case by the Government of Spain regarding the warships JUNO and LA GALGA — to ownership of foreign warships sunk in waters of the United States without being captured, and to recognize that title to such sunken warships is not lost absent express abandonment by the sovereign." Statement of Interest, U.S. Dep't of State, ¶ 9 (emphasis added). Further, the State Department notes, "U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment." Id. ¶ 15.

In a case such as this, it is "not for the courts to deny an immunity which our government has seen fit to allow." Republic of Mexico v. Hoffman, 324 U.S. 30, 35, 65 S.Ct. 530, 89 L.Ed. 729 (1945) (involving an in rem admiralty action against foreign owned merchant vessel). Our Constitution charges the political branches with the conduct of foreign affairs. See Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109-10, 68 S.Ct. 431,

92 L.Ed. 568 (1948). The express abandonment standard is regularly applied by the executive branch in dealing with foreign vessels. It is simply not for us to impose a looser standard that would interfere with this long standing political judgment in sensitive matters of international law.

III.

We now address whether there has been an express abandonment of LA GALGA.[1] The district court found that Spain had expressly abandoned LA GALGA in Article XX of the Treaty of 1763. See Sea Hunt, 47 F.Supp.2d at 690. This interpretation, however, contravenes the plain language of the 1763 Treaty. It also flies in the face of the understandings of Spain and Great Britain, the relevant parties to Article XX. It impairs as well the respect that international law accords Spain's claim of ownership with regard to its shipwrecks and the military grave sites that they contain.

A.

Sea Hunt and Virginia must demonstrate express abandonment by "clear and convincing evidence."

---

1. We affirm the district court's holding that JUNO was not expressly abandoned in the 1819 Treaty. Article II of that treaty transferred territory from Spain to the United States. But, as the district court noted, "Nothing in Article 2 implies that Spain has ceded anything other than territory and the structures erected on that territory." Sea Hunt, 47 F.Supp.2d at 690. We agree that Spain did not expressly abandon JUNO in the 1819 Treaty for the reasons stated by the district court. See id. at 690-91.

Columbus-America, 974 F.2d at 464; see also Fairport, 177 F.3d at 501; accord Falgout Bros., Inc. v. S/V Pangaea, 966 F.Supp. 1143, 1145 (S.D.Ala.1997); Hener, 525 F.Supp. at 357. This is a high burden and an "exacting standard." Fairport, 177 F.3d at 501. The district court found such clear and convincing evidence of an express abandonment in the 1763 Definitive Treaty of Peace between France, Great Britain, and Spain, which ended the Seven Years War and transferred most of Spain's territories in the new world to Great Britain. See Sea Hunt, 47 F.Supp.2d at 689 ("The sweeping language of Spain's cession in Article XX, together with the background of the complete change of sovereignty in the North American colonies, makes it unlikely that Spain intended to, or would have been allowed by Great Britain to maintain a claim of ownership over the wreck of LA GALGA . . . .").

We disagree with the district court's interpretation. Article XX of the 1763 Treaty provides:

> [H]is Catholick Majesty cedes and guaranties, in full right, to his Brittanic Majesty, Florida, with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi. And, in general, every thing that depends on said countries and lands, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise. . . . [S]o that the Catholick King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner

> and form. . . . It is moreover stipulated, that his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things.

Definitive Treaty of Peace, Feb. 10, 1763, Fr.-Gr. Brit.-Spain, art. 20, Consol. T.S. 331-32.

The plain language of this treaty provision contains no evidence of an express abandonment. First, Article XX does not include any of the common nouns that could refer to LA GALGA. Notably absent are the terms "shipwreck," "vessels," "frigates," or "warships." Other provisions of the treaty mention these terms explicitly. For instance, Article III, which provides for the restoration of prisoners, states "all the ships of war and merchant vessels which shall have been taken . . . shall likewise be restored." See also Art. VIII (stating that the British may remove their belongings in "vessels"); Art. XIX (same). Further, the treaty also specifically catalogues items other than territory intended to be conveyed. For instance the treaty transfers control of "factories," Art. XI, "artillery," Art. XII, "fortresses," Art. XIX, "castles," Art. XXI, and "papers, letters, documents, and archives," Art. XXII. When the parties to the 1763 Treaty intended to cede non-territorial state property, they did so with great particularity. Yet nowhere does the treaty specifically mention the cession of "shipwrecks." "Express" is defined as "firmly and explicitly stated; particular, specific." Webster's II New College Dictionary 396 (1999). Without any mention of shipwrecks or any seagoing vessels it is hard to read Article XX as an express abandonment of LA GALGA.

Second, the cession of state property in Article XX is limited to all that Spain possesses "on the continent of North America." The plain meaning of this is that Spain ceded to Great Britain only what was located on land. Spain did not cede possessions in the sea or seabed. The district court focused on the fact that the "clause is a sweeping grant of territory and property," yet overlooked the "on the continent" limitation. This limitation excludes wrecks like LA GALGA that were located not on the continent, but in the seabed.

Sea Hunt and the Commonwealth urge that "on the continent" included coastal waters, and that consequently the 1763 Treaty constitutes an express abandonment of LA GALGA. Yet in a similar provision of the treaty, the parties specifically cede both land and the coasts. Article IV cedes French Canada to Great Britain and specifically provides for cession of "in general every thing that depends on the said countries, lands, islands, and coasts" (emphasis added). It also transfers all rights held "over the said countries, lands, islands, places, coasts, and their inhabitants" (emphasis added). By contrast, Article XX states that Spain cedes to Great Britain "in general, every thing that depends on the said countries and lands," and all rights "over the said countries, lands, places, and their inhabitants." There is no mention at all of coasts in Article XX.

Moreover, in light of eighteenth century understandings, this "on the continent" language would hardly amount to clear and convincing evidence of an express abandonment of property in coastal waters. In fact, the three-mile coastal belt, well-recognized today, had no clear counterpart in eighteenth century international law. Ownership of the

three-mile belt in the eighteenth century was but a "nebulous suggestion." United States v. California, 332 U.S. at 32, 67 S.Ct. 1658. When "in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast." Report of Special Master Maris, O.T. 1973, No. 35 Orig. at 47, adopted by United States v. Maine, 420 U.S. 515, 95 S.Ct. 1155, 43 L.Ed.2d 363 (1975). Sovereign rights to the territorial sea were not established in international law until some time in the nineteenth century. See California, 322 U.S. at 33, 64 S.Ct. 899; accord Maine, 420 U.S. at 524, 95 S.Ct. 1155. Nineteenth century and present-day views of territorial cession are hardly dispositive of what mid-eighteenth century treaty signatories intended. See Shively v. Bowlby, 152 U.S. 1, 57, 14 S.Ct. 548, 38 L.Ed. 331 (1894); United States v. Angcog, 190 F.Supp. 696, 698 (D.Guam 1961).

Third, Article XX provides that Spain ceded "every thing that depends on the said countries and lands." The district court found that this included the wreck of LA GALGA. See Sea Hunt, 47 F.Supp.2d at 689. It is anything but clear, however, given eighteenth century understandings, that "every thing that depends" can be interpreted to include this shipwreck. When interpreting this same clause of Article XX, Chief Justice Marshall noted, "By the 20th article of the [1763] treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or southeast of the Mississippi, to Great Britain." Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 584, 5 L.Ed. 681 (1823) (emphasis added). At the time, "dependencies" meant other

territories that were dependent upon the sovereign country. A dependency was "a territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe." United States v. The Nancy, 27 F. Cas. 69, 71 (C.C.D.Pa.1814) (No. 15,854); see also Webster's II 303 (defining "dependency" as a "territory or state under the jurisdiction of another country from which it is separated geographically"). Under the Supreme Court's relatively contemporaneous interpretation, "every thing that depends" does not include Spanish property such as the shipwrecks, but rather refers to "dependencies" such as nearby islands.

Fourth, Article XX provides that "his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things." There is no deadline for the right to take this property away. Rather the right is guaranteed irrespective of the time elapsed. By contrast, other provisions of the Treaty specifically set time limits for certain actions. For instance, Article XX itself states that Spanish subjects may "bring away their effects, as well as their persons . . . the term limited for this emigration being fixed to the space of eighteen months." See also Art. VIII (providing four months for the demolition of fortresses); Art. XIII (eighteen months for the emigration of British subjects from Guadaloupe); Art. XXIV (providing different time periods for various "restitutions" and "evacuations"). His "Catholick Majesty," however, has no limitation whatsoever on the removal of state property. In treaty interpretation as in statutory interpretation, particular provisions may not be divorced from

the document as a whole. See Kolovrat v. Oregon, 366 U.S. 187, 195-96, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961) (refusing to interpret a treaty provision in isolation). Where such specific time limits were included for a variety of different actions but not included for the clause at issue here, there is a strong presumption that no time limit applies.

In sum, Article XX does not contain "clear and convincing" evidence of express abandonment. While the language of Article XX encompasses a great deal of land and property, it does not mention vessels or shipwrecks, nor does Article XX refer to Spanish property in the sea or on the seabed. Such general treaty language does not come close to an "express declaration abandoning title," Columbus-America, 974 F.2d at 464, and therefore cannot amount to clear and convincing evidence of an express abandonment.

B.

This view of the treaty is not ours alone. Both parties to Article XX of the 1763 Treaty agree that the Kingdom of Spain did not abandon LA GALGA. Such agreement is significant. When "the parties to a treaty both agree as to the meaning of a treaty provision . . . we must, absent extraordinarily strong contrary evidence, defer to that interpretation." Sumitomo Shoji, 457 U.S. at 185, 102 S.Ct. 2374; see also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999) (the terms of a treaty must be given a "meaning consistent with the shared expectations of the contracting parties" (internal quotation marks omitted)). "Treaties are contracts between sovereigns, and as such, should be construed to give

effect to the intent of the signatories." Tabion v. Mufti, 73 F.3d 535, 537 (4th Cir.1996). Postratification understandings of the contracting parties are traditionally considered as aids to treaty interpretation. See El Al Israel Airlines, 525 U.S. at 167, 119 S.Ct. 662.

After the district court issued its judgment, the United Kingdom issued a formal Diplomatic Note clarifying that Article XX of the 1763 Treaty "cannot be interpreted as involving an express abandonment by Spain of its rights to the shipwreck of 'LA GALGA.' . . . [T]he intention behind Article XX was to transfer sovereignty over the territories mentioned in that Article, and not to deal with, or otherwise affect, the quite separate issue of the ownership of shipwrecks on the waters adjacent to these or other territories in North America." Spain also issued a Diplomatic Note reaffirming its view that the 1763 Treaty "was not a cession or abandonment of H.M. Frigate 'LA GALGA' or other shipwrecked vessels of Spain." "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." Kolovrat, 366 U.S. at 194, 81 S.Ct. 922. We decline to disregard the position of the relevant treaty signatories that Article XX was not intended to include movable property located in coastal waters. Given that their view accords with the language and structure of the Treaty itself, it can hardly be contended that Sea Hunt has put forward "extraordinarily strong contrary evidence," to rebut the parties' interpretation.

C.

Although we believe the standard of express abandonment controls in the circumstances of this case, it would be difficult under any test to conclude that LA GALGA was abandoned. The mere passage of time since a shipwreck is not enough to constitute abandonment. See Columbus-America, 974 F.2d at 461; Fairport, 177 F.3d at 499 (length of time "one factor among several relevant to whether a court may infer abandonment"). Spain attempted salvage after LA GALGA sank, maintained LA GALGA on its naval registry, and asserted a claim after Sea Hunt brought its admiralty action. Moreover, the shipwreck lies scattered and buried in the sand beneath the water, and technology has only recently become available for its salvage. See Yukon Recovery, L.L.C. v. Certain Abandoned Property, 205 F.3d 1189, 1194 (9th Cir.2000) ("[L]ack of technology is one factor to consider in determining whether inaction constitutes abandonment."). In other cases where abandonment was found for Spanish wrecks, Spain made no claim of ownership. See Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir.1978) (noting that "[t]he modern day government of Spain has expressed no interest in filing a claim in this litigation as a successor owner"); Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F.Supp. 953, 956 (M.D.Fla.1993) (finding that "no one . . . asserted an interest in the alleged vessel"). By contrast, Spain has vigorously asserted its interest in the wreck of LA GALGA and wishes to maintain it as a sacred military gravesite. In light of these circumstances, even a finding of implied abandonment would be improper.

Appendix A

D.

The United States has strenuously defended Spain's ownership over these vessels. The government maintains that this is required by our obligations under the 1902 Treaty as well as general principles of international comity. The United States "is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea." Amicus Curiae Br. of U.S. at 1. Protection of the sacred sites of other nations thus assists in preventing the disturbance and exploitation of our own. Here the government's interest is rooted in customary international law. See 8 Digest of U.S. Practice in International Law 999, 1006 (1980) (noting that interference with sunken military vessels, "especially those with deceased individuals," is "improper" and that foreign governments' requests to have such views respected "should be honored").

It bears repeating that matters as sensitive as these implicate important interests of the executive branch. Courts cannot just turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner. Far from abandoning these shipwrecks, Spain has vigorously asserted its ownership rights in this proceeding. Nothing in the law of admiralty suggests that Spain has abandoned its dead by respecting their final resting place at sea.

Appendix A

IV.

We reverse the judgment of the district court that the Kingdom of Spain abandoned the vessel LA GALGA. We affirm the judgment of the district court as to JUNO. Both vessels remain the property of Spain.[2] The judgment of the district court is accordingly

AFFIRMED IN PART AND REVERSED IN PART.

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2. We affirm the district court's denial of a salvage award to Sea Hunt. The district court found, "It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the JUNO was a Spanish ship and that Spain might make a claim of ownership and decline salvage . . . . Because Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on JUNO, Sea Hunt can not be entitled to any salvage award."

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED APRIL 27, 1999

United States District Court,
E.D. Virginia,
Norfolk Division.

SEA HUNT, INC.,

Plaintiff,

v.

THE UNIDENTIFIED, SHIPWRECKED VESSEL OR VESSELS, their apparel, tackle, appurtenances, and cargo located within coordinates 38 degrees 01' 36" North Latitude, 75 degrees 14' 33" West Longitude; 37 degrees 57' 21" North Latitude, 75 degrees 13' 00" West Longitude; 38 degrees 01' 36" North Latitude, 75 degrees 13' 14" West Longitude; 37 degrees 57' 33" North Latitude, 75 degrees 17' 44" West Longitude and/or 37 degrees 55' 00" North Latitude, 75 degrees 19' 18" West Longitude; 37 degrees 54' 09" North Latitude, 75 degrees 17' 00" West Longitude; 37 degrees 51' 21" North Latitude, 75 degrees 18' 52" West Longitude; 37 degrees 51' 20" North Latitude, 75 degrees 21' 05" West Longitude, in rem,

Defendants.

No. 2:98CV281.

April 27, 1999.

* * *

Appendix B

OPINION AND ORDER

CLARKE, District Judge.

This case is currently before the Court on Plaintiff Sea Hunt, Inc.'s Motion for Partial Judgement on the Pleadings and Claimant Kingdom of Spain's Motion for Summary Judgement. This matter is a dispute over the status of two shipwrecked vessels believed to be the remains of the Spanish vessels JUNO and LA GALGA, which were sunk in 1802 and 1750, respectively. Plaintiff Sea Hunt, Inc. ("Sea Hunt"), a maritime salvage company based in the Eastern Shore of Virginia, has located the shipwrecked vessels near the coast of Assateague Island and has obtained permits from the Virginia Marine Resources Commission ("VMRC"), an agency of the Commonwealth of Virginia, to conduct salvage operations and to recover historic artifacts from the wrecks. The Commonwealth of Virginia ("Virginia") has asserted a claim of ownership over the vessels, pursuant to the Abandoned Shipwreck Act of 1987 ("ASA"). See 43 U.S.C. §§ 2101-2106. Claimant Kingdom of Spain ("Spain") asserts that the wrecks of JUNO and LA GALGA have not been abandoned and remain the sovereign property of Spain. The United States has filed two statements of interest and an amicus brief in support of Spain. Although there is a factual dispute between the parties as to whether the JUNO and LA GALGA are warships, that question is immaterial and does not prevent the Court from ruling on the current motions at this time.

Based on the arguments of the parties, pleadings, and the evidence before the Court, the Court FINDS that as a

matter of law Spain has not abandoned, and therefore retains ownership over, the wreck believed to be the JUNO. The Court also FINDS, however, that Spain has expressly abandoned its claim to LA GALGA, title to which now rests with Virginia according to the ASA. Accordingly, Sea Hunt's Motion for Partial Judgement on the Pleadings is GRANTED in part and DENIED in part, and Spain's Motion for Summary Judgement is GRANTED in part and DENIED in part.

I. Factual and Procedural Background

The following facts detailing the history of JUNO and LA GALGA are drawn primarily from the affidavit of David Beltran Catala, Counsel for Judicial Affairs of the Embassy of Spain in Washington, D.C., and are not in dispute.

A. The Ships

1. LA GALGA

The fifty-gun frigate LA GALGA de Andalucia ("LA GALGA"), the "Greyhound" in English, was commissioned into the Spanish Navy in 1732. LA GALGA initially served as part of Spain's Mediterranean Fleet, but in 1736, she sailed for Buenos Aires to join squadrons patrolling the Atlantic and Carribean. For the next fourteen years LA GALGA served as a convoy escort, traveling mainly between Veracruz, Havana, and Spain's principal home naval base at Cadiz.

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Under the command of Don Daniel Houny, an Irishman in the service of Spain, LA GALGA left Havana on its last voyage on August 7, 1750. LA GALGA was charged with escorting a convoy of merchant ships across the Atlantic Ocean to Cadiz, and carried on board the 2nd Company of the 6th Battalion of Spanish Marines. On August 18, 1750, the convoy ran into a hurricane near Bermuda. The storm separated the ships in the convoy and forced them westward towards the American coast. During the seven-day storm, LA GALGA lost three masts and began to take on water. Efforts to lighten the ship by pushing her cannons overboard were unsuccessful, and on August 25, 1750, LA GALGA sank off the coast of the Eastern Shore near the Maryland/ Virginia border. Most of her crew and passengers were able to reach land safely.

Following the wreck, Captain Houny attempted to salvage items from the wreck, but was hindered in doing so by the pillaging and looting by local residents. In November, 1750, Captain Houny was able to procure the assistance of Governor Ogle of Maryland in protecting the wreck, but before further salvage could be made a second storm came and broke up what was left of the ship, ending the salvage efforts. LA GALGA then lay undisturbed for almost 250 years, until the current salvage attempts by Sea Hunt.

2. JUNO

The JUNO was built in 1789. A thirty-four gun frigate, she entered the service of the Spanish Navy in 1790, and sailed with a squadron of ships across the Atlantic to Cartagena. JUNO served Spain for the next ten years in the

Atlantic and Caribbean, traveling many of the same routes LA GALGA had traveled a half century earlier.

On January 15, 1802, JUNO set sail from Veracruz under the command of Don Juan Ignacio Bustillo, bound for Cadiz. A severe storm caused damage to JUNO, and forced her to put in at San Juan where she underwent repairs for seven months. On October 1, 1802, JUNO left San Juan, together with the frigate ANFIRIZA, again bound for Cadiz. JUNO's mission was to transport the Third Battalion of the Regiment of Africa, along with the soldiers' families and several other civilian officials, back to Spain after a long period of service abroad.

On October 19, 1802, a storm arose which separated JUNO and ANFIRIZA. The storm continued, and by October 22, 1802, JUNO was taking on water. Her crew was forced to jettison her cannons in an attempt to lighten the ship. On October 25, 1802, the battered JUNO encountered the American schooner LA FAVORITA. The two ships sailed westward together in the hopes of reaching an American port in which to weather the rest of the storm. JUNO continued to take on water, however, and during a lull in the storm on October 27, 1802, Captain Bustillo ordered the passengers and crew of JUNO to begin transferring to LA FAVORITA. Only seven persons were able to transfer before the storm picked up and forced the ships apart, making further transfers impossible.

On the morning of October 28, 1802, LA FAVORITA lost sight of JUNO in a heavy fog. When the fog cleared, JUNO was gone, and would not be seen again. A total of

432 sailors, soldiers and civilians perished when JUNO sank. Although Spanish authorities ordered an investigation into the loss of JUNO, the location of the wreck was not discovered until the recent efforts by Sea Hunt.[1]

B. Procedural History

The current action was initiated by Sea Hunt with the filing of a Verified Complaint in Admiralty In Rem against the two wrecks on March 11, 1998. The complaint states five counts: 1) that according to the Abandoned Shipwreck Act, the Commonwealth of Virginia is the rightful owner of the shipwrecks, and Sea Hunt is entitled to the rights granted to it by the Virginia Marine Resources Commission; 2) that Sea Hunt is entitled to a liberal salvage award for voluntarily recovering artifacts which are in "marine peril;" 3) that Sea Hunt is entitled to an injunction prohibiting other salvors from attempting to recover artifacts from the wrecks; 4) that based on information and belief, the two wrecks are the remains of the Spanish frigates JUNO and LA GALGA, and Sea Hunt is entitled to declaratory judgement that Spain may no longer exercise sovereign prerogative over the wrecked vessels; and, 5) that Sea Hunt is entitled to declaratory judgement stating that no government other than the Commonwealth of Virginia, including the United States or any foreign sovereign, has jurisdiction to regulate salvage operations over the two shipwrecks.

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1. The Court notes, however, that at least one other salvage company has claimed to have found the wreck of JUNO. See Quicksilver International, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, No. 88-618-N (E.D.Va. filed Sept. 13, 1988). See also discussion infra Section II.A.

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On March 12, 1998, this Court issued an Order directing that a warrant be issued for the arrest of the shipwrecked vessels and artifacts, granting to Sea Hunt exclusive rights of salvage until further notice of the Court, and directing Sea Hunt to publish a general notice of the claim, and to send specific notice of the action to both the Untied States and Spain. By separate Orders of the same date, the Court appointed Sea Hunt as special process server and substitute custodian of the wrecks.

On May 11, 1998, a motion to intervene was filed by Alpha Quest, Inc. and Richard L. Cook ("Alpha Quest/ Cook"), claiming ownership over the vessels in addition to asserting several claims against Sea Hunt. On May 13, 1998, a Verified Claim and an Answer were filed by Virginia, asserting that Virginia is the rightful owner of the wrecks under the Abandoned Shipwreck Act, and that its rights were being exercised through the permits issued to Sea Hunt by the VMRC. On May 18, 1998, the United States filed a Motion to intervene, and a claim on behalf of Spain asserting ownership of the vessels.[2] In addition, the United States filed an answer asserting the United States' own interests in exerting regulatory authority over the wrecks, which lay near the boundaries of the Assateague Island National Seashore.[3]

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2. The United States sought to represent Spain's interests in the wrecks according to what it believed to be its obligations under the Treaty of Friendship and General Relations Between the United States of America and Spain, signed July 3, 1902. See 33 Stat. 2105.

3. The Pleadings filed by the United States were initially filed May 13, 1998 in the Alexandria Division of this Court. They were forwarded to the Norfolk Division, where they were filed on May 18, 1998.

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On May 20, 1998, an intervening complaint was filed by Virginia, asserting ownership over the shipwrecked vessels. On June 2, 1998, Alpha Quest/Cook filed an answer to Sea Hunt's complaint, together with several counterclaims. Sea Hunt filed an answer to Virginia's intervening complaint on June 15, 1998, in which it admitted Virginia's ownership of the shipwrecked vessels.[4]

On August 21, 1998, the United States filed a Motion to Modify the Preliminary Injunction of March 12, 1998, in order to allow the National Park Service to regulate the salvage operations off the Assateague Island National Seashore. Also on August 21, 1998, Sea Hunt filed a motion to Strike and Dismiss the United States' motion to intervene on its own behalf, a motion in opposition to the United States' motion to intervene on behalf of Spain, and a motion for Partial Judgement on the Pleadings dismissing the claim of Spain. Also on August 21, 1998, Sea Hunt filed a motion to strike and dismiss the motion to intervene, answer and counterclaims of Alpha Quest/Cook. This Court held a hearing on all pending motions on September 15, 1998.

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4. On July 14, 1998, this Court entered an Order clarifying several procedural matters: 1) Sea Hunt's answer to Virginia's intervening complaint was returned because it was not signed by local counsel of record; 2) Alpha Quest/Cook's motion to intervene was denied for failure to comply with Rule 24(c); 3) Spain's claim was not properly verified according to Supp. Adm. Rule (C)(6); 4) because the claim was defective, Spain's answer was premature; and 5) the United States' motion to intervene did not include a supporting verified claim, and was therefore denied. All parties were given 10 days for supplemental filings to correct the defects, and all of the relevant pleadings were re-filed.

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At the September 15, 1998, hearing, a consent Order was entered dismissing several of Alpha Quest/Cook's counterclaims, without prejudice. On September 17, 1998 this Court entered an Order dismissing Alpha Quest/Cook's remaining claims, except for the verified claim of ownership of the vessels. See Sea Hunt, Inc. v. Unidentified Vessel or Vessels, 181 F.R.D. 325 (E.D.Va.1998). On September 23, 1998, this Court granted Sea Hunt's motion to strike and dismiss the United States' motion to intervene on its own behalf. See Sea Hunt, Inc. v. Unidentified Vessel or Vessels, 182 F.R.D. 206 (E.D.Va.1998).[5] Finally, on September 25, 1998, the Court denied the motion to intervene filed by the United States on behalf of Spain. See Sea Hunt, Inc. v. Unidentified Vessel or Vessels, 22 F.Supp.2d 521 (E.D.Va. 1998). In the September 25, 1998, Order, the Court held that the United States did not have the authority to act as counsel to represent Spain's interests in this matter. The Court granted Spain 90 days to obtain counsel and to make an appearance on its own behalf, and advised the United States that if it wished to assert its interests in this action, it should do so through an amicus brief or other statement of interest.[6]

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5. The September 23, 1998, Order was later modified by an Amended Opinion and Order on October 29, 1998. The modification was merely to clarify the Court's language, and did not affect the substance of the original Order.

6. The United States initially filed a notice of appeal of the September 25 Order, but withdrew the appeal on February 10, 1999, thus relieving this Court of any jurisdictional concerns it had during the pendency of the appeal. See Sea Hunt v. Unidentified, Shipwrecked Vessel or Vessels, etc., No. 2:98cv281 (E.D.Va. March 5, 1999) (Order asserting jurisdiction).

Action on Sea Hunt's motion for partial judgement on the pleadings was delayed to allow Spain time to obtain new counsel and to respond.[7]

Spain responded through private counsel on December 23, 1998, with a motion to intervene, a verified claim and an answer on its own behalf. At the same time, Spain filed the instant Motion for Summary Judgement, and a brief in opposition to Sea Hunt's motion for Partial Judgement on the Pleadings. Also on December 23, 1998, the United States filed a motion for authorization to file a statement of interest and an amicus brief. On January 25, 1999, Sea Hunt filed a motion to dismiss the remaining claim of Alpha Quest/Cook.

On February 24, 1999, the Court entered a consent Order extending the time for scheduling a hearing on pending motions, and allowing Spain until March 15, 1999 to file any remaining briefs.[8] At a hearing on March 5, 1999, the Court granted the United States' motion to file an amicus brief and statements of interest, and scheduled arguments on all pending motions for April 1, 1999.

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7. In "an abundance of caution," Sea Hunt filed a motion to renew its motion for partial judgement on the pleadings on February 16, 1999, after Spain had made an appearance through its own counsel. As the Court never dismissed Sea Hunt's original motion, the motion to renew was unnecessary.

8. In addition, the February 24, 1999, Order waived the page limitations for briefs contained in Local Rule 7.

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II. Preliminary Motions

Before the Court addresses the merits of the motion for partial judgment on the pleadings and the motion for summary judgment, the Court must dispose of one preliminary matter and three additional procedural motions brought by the parties.

A. Quicksilver

As a preliminary matter, the Court notes that it has pending before it another case in admiralty, Quicksilver International, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, No. 88-618-N (E.D.Va. filed Sept. 13, 1988), in which this Court, in 1988, awarded to Quicksilver International, Inc. ("Quicksilver") exclusive salvage rights to an unidentified shipwrecked vessel located off the coast of Maryland. Subsequent to the Court's award of salvage rights in that case, Quicksilver reported to the Court that based on its salvage operations and its investigation of other historical data, it believed the shipwreck it was salvaging to be the remains of the Spanish vessel JUNO. Sea Hunt, of course, believes that one of the shipwrecks that is the subject of the case at bar is, in fact, JUNO.

Prior to the April 1, 1999, hearing in the case at bar, the Court notified counsel for Quicksilver and counsel for Sea Hunt that both salvors or potential salvors were making claims to a Spanish vessel named JUNO. The Court requested that counsel for Quicksilver attend the April 1, 1999, hearing to assure the Court that the shipwrecks at issue in the two

cases were indeed two separate and distinct shipwrecks. At the hearing, counsel for Quicksilver and Sea Hunt adequately assured the Court that they had conferred, compared locations, and determined that their clients were making claims against and were concerned with different shipwrecks. Counsel for Spain indicated that Spain believed that Sea Hunt, and not Quicksilver, had found the actual JUNO.

B. Alpha Quest/Cook

The only claim that Alpha Quest/Cook has remaining in this case is a verified claim of ownership to the sunken vessels. Sea Hunt filed a motion to dismiss this claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure based on their contention that Alpha Quest/Cook had made inconsistent factual representations to the Court with regard to the question of ownership. The Court need not reach that issue because at oral argument, counsel for Alpha Quest/Cook admitted to the Court that their only interest in this case was that of obtaining some sort of salvage award from Sea Hunt based on the aid that Alpha Quest/Cook allegedly gave to Sea Hunt in obtaining salvage permits from Virginia. Alpha Quest/Cook admitted to the Court that they have no basis for asserting any claim of ownership or salvage rights over the sunken vessels. Consequently, when the Court suggested that Alpha Quest/Cook's best course of action would be to assert any claims they may have in a private action against Sea Hunt, Alpha Quest/Cook agreed. Thus, the Court hereby GRANTS Sea Hunt's motion to dismiss Alpha Quest/Cook and DISMISSES Alpha Quest/Cook's Verified Claim, without prejudice to Alpha Quest/Cook's

right to bring certain other claims against Sea Hunt in a separate action.[9]

C. Sea Hunt's Motion to Strike Spain's Verified Claim

Sea Hunt has filed a motion to strike the verified claim of Spain on the grounds that Spain has failed to comply with Supplemental Admiralty Rule C(6) and with Local Admiralty Rule (e)(3) of the Eastern District of Virginia. Sea Hunt argues that Spain failed to verify its claim of ownership either under oath or by solemn affirmation in accordance with 28 U.S.C. § 1746. In response, Spain conditionally filed an amended verified claim which corrected the alleged defects.

Rule C(6) requires that a claim in admiralty "shall be verified on oath or solemn affirmation. . . ." Fed.R.Civ.P. C(6). Local Rules require that a complaint in admiralty filed under Rule (C) "shall be verified on oath or solemn affirmation by a party or by an authorized officer of a corporate party." LAR (e)(3). If a party chooses to verify the document by solemn affirmation, 28 U.S.C. § 1746 provides a method by which an unsworn document may nonetheless qualify as a properly verified document: the declarant must explicitly state that the statements contained therein are executed "under penalty of perjury." See 28 U.S.C. § 1746.

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9. The Consent Order entered by this Court on September 15, 1998, dismissed Counts I, II, and III, and subparagraphs (b), (f), (g), and (h) of the prayer of counterclaim without prejudice. These are the only claims remaining from the original complaint which Alpha Quest/Cook may assert against Sea Hunt; all other claims were dismissed with prejudice.

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In Spain's Verified Complaint, David Beltran Catala, Counsel for Judicial Affairs of the Embassy of Spain in Washington, D.C., attempts to verify Spain's claim of ownership merely by stating that the claim is "[s]ubscribed to under oath. . . ." This verification shows neither that a formal oath was administered by one authorized to administer such oath nor that the document was signed "under penalty of perjury." Thus, this verification does not comply technically with either form of verification available under the admiralty rules.

Since the verification does not comply technically with the mandates of the pertinent admiralty rules, Sea Hunt's motion to strike the verification is GRANTED. In the interests of justice, however, the Court also GRANTS Spain's conditional motion to file an amended verification and DENIES Sea Hunt's request for dismissal of the now properly filed verified claim.

D. Factual Disputes

Finally, Spain has brought a motion to strike the "Notice of Filing" ("Notice") and accompanying affidavits submitted by Sea Hunt on March 15, 1999. In the Notice and affidavits, Sea Hunt asserts, arguably for the first time in this litigation, that JUNO and LA GALGA were not warships at the times of their respective sinkings and therefore not entitled to the special status and protections that the law affords to warships. Spain asserts that the factual issue Sea Hunt wishes to raise at this late stage of the litigation is not a "genuine" issue of material fact that would allow Sea Hunt to avoid summary judgment, see Fed.R.Civ.P. 56(c), but rather a "contrived"

issue of fact created by Sea Hunt as a last minute attempt to avoid summary judgment. Spain argues further that Sea Hunt's affidavits clearly contradict the factual position that Sea Hunt has taken since the inception of this litigation.

The Court is concerned as to why Sea Hunt waited so long to bring this potential factual dispute to the Court's attention. However, for reasons set forth more thoroughly in the Opinion below, the Court finds it unnecessary to the disposition of this case to decide whether LA GALGA and JUNO were indeed warships at the time of their respective sinkings. Therefore, the Court DECLINES to rule on Spain's motion.

III. Abandonment of JUNO and LA GALGA

A. Definition of Abandonment

The crux of this case is the issue of abandonment. There is no doubt that at one point in time JUNO and LA GALGA belonged to Spain. The current ownership of the shipwrecks depends on whether Spain has abandoned its claim to the two vessels. Virginia's, and by extension Sea Hunt's, claim rests on the Abandoned Shipwreck Act of 1987 ("ASA"), a federal act. Under the ASA:

> [t]he United States asserts title to any abandoned shipwreck that is —
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> (1) embedded in submerged lands of a State. . . .

43 U.S.C.A. § 2105(a) (West Supp.1998). Title over a shipwreck covered under the ASA is transferred to the State

in whose waters the wreck is located. See 43 U.S.C. § 2105(e). Thus, if this Court finds that JUNO and LA GALGA have at any time been abandoned by Spain, then according to the ASA, the wrecks belong to Virginia.[10] If, on the other hand, the Court finds that Spain has never abandoned JUNO and LA GALGA, then Spain retains ownership over them. The ASA itself does not provide a definition of "abandonment." Therefore, the Court must look to case law for guidance on determining the status of the shipwrecked vessels in this case.

The Fourth Circuit Court of Appeals has dealt extensively with the issue of abandonment in the case of Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 461 (4th Cir.1992), cert. denied, 507 U.S. 1000, 113 S.Ct. 1625, 123 L.Ed.2d 183 (1993) ("Columbus-America"). That case is binding authority in this Court, and will be discussed in detail.

B. Columbus-America Discovery Group

Columbus-America involved the wreck of the S.S. CENTRAL AMERICA. The salvage of the wreck of the CENTRAL AMERICA has been the subject of considerable litigation.

The CENTRAL AMERICA sank during a storm in 1857 while on a journey from Havana to New York, loaded with passengers and gold from the California gold rush. The

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10. No party in this case has argued or otherwise implied that the wrecks of JUNO and LA GALGA are not "embedded in the submerged lands" of Virginia.

demise of the CENTRAL AMERICA was widely reported, not only because of the 425 passengers who died, but also because of the fortune in commercial and privately owned gold which was lost. The commercial shipments of gold were insured, and the underwriters promptly paid the claims arising from the wreck. The payment of the claims vested title to the gold in the underwriters, who unsuccessfully attempted to organize salvage efforts. Because the location and depth of the wreck was unknown, no serious attempts at salvage were mounted.

Beginning in the 1970s, interest in salvaging the wreck revived, and new technology made such an expedition feasible for the first time. Several private parties sought a relinquishment of the underwriters' rights to the gold. Although the underwriters negotiated with potential salvors, no agreements were ever reached. Finally, in 1987, the Columbus-America Discovery Group ("CADG") located the wreck in over 8000 feet of water, and filed an in rem action against the wreck on May 27, 1987, in this Court.[11] On September 29, 1989, the insurance underwriters filed claims with the court asserting their rights of ownership.[12] After a ten-day trial, the district court found that because the underwriters had apparently destroyed documents pertaining to the payment of claims on the CENTRAL AMERICA, and

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11. After two years of salvage, CADG realized that they had found the wrong ship. Eventually, they discovered the actual wreck of the CENTRAL AMERICA, and obtained a salvage injunction for the new wreck site on August 18, 1989.

12. The Superintendent of Insurance of the State of New York also appeared on behalf of several defunct insurance companies.

130 years had passed without the underwriters attempting to claim the sunken cargo, their claim to the gold had been abandoned. Pursuant to the law of finds, the Court awarded the gold in its entirety to CADG. See Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 742 F.Supp. 1327 (E.D.Va.1990).

On appeal, the Fourth Circuit closely examined the law of salvage versus the law of finds as used by the district court. Salvage law, according to the Court, is applied "when ships or their cargo have been recovered from the bottom of the sea by those other than their original owners." Columbus-America, 974 F.2d at 459. Under salvage law, "the original owners still retain their ownership interests in such property. . . ." Id. The law of finds, in contrast, "expresses the ancient and honorable principle of finders, keepers," Id. (quoting Martha's Vineyard Scuba HQ, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065 (1st Cir.1987)), and applies "only to maritime property which had never been owned by anybody. . . ." Id. The Court noted a "relatively recent trend in the law" which had "seen the law of finds applied to longlost and abandoned shipwrecks." Id. at 460. Finally, the Court recognized that "[c]ourts in admiralty favor applying salvage law rather than the law of finds." Id.

Having determined that "finds law is applied to previously owned sunken property only when that property has been abandoned by its previous owners," Id. at 461, the Court turned to a discussion of abandonment. According to the Court, abandonment in the case of a shipwreck "means much more than merely leaving the property, for it has long

been established that when articles are lost at sea the title of the owner in them remains." Id. (quotations omitted). Furthermore, after a ship has been sunk, "lapse of time and nonuser are not sufficient, in and of themselves, to constitute abandonment." Id. (quotations omitted).

The Fourth Circuit in Columbus-America divided cases which applied the law of finds to shipwrecks into two categories. First were "cases where owners have expressly and publicly abandoned their property." Id. Second were cases where "no owner appears in court" to claim the shipwrecks. Id. Significantly, the Court pointed out that in the second category of cases, the absence of an owner:

> may give rise to an inference of abandonment, but should an owner appear in court and there be no evidence of an express abandonment, the law of salvage must be applied.

Id.

The Court then observed that the district court's opinion:

> appears to be the only reported decision involving salvaged treasure from ancient shipwrecks wherein a court has applied the law of finds despite the fact that the previous owner appeared in court. In all other finds law cases, no prior owner has appeared.

Id. at 462. A review of other finds law cases confirmed the Court's observation. The Court specifically discounted

language from the Fifth Circuit in Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir.1978), which indicated that lapse of time was a sufficient criteria for applying the law of finds,[13] because the court in Treasure Salvors made a point of noting that Spain, the previous owner of the wrecked vessel, had not appeared in court to assert an ownership claim.

Finally, after its extensive review of applicable law, the Columbus-America Court came to the following conclusion:

> [W]hen sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds. Finds law should be applied, however, in situations where the previous owners are found to have abandoned their property. Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and longlost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest; in such a case the normal presumptions would apply and an

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13. See Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir.1978) ("[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.")

> abandonment would have to be proved by strong and convincing evidence.

Id. at 464-65.

The Fourth Circuit in Columbus-America then held that the underwriters had not abandoned their claim to the gold, finding that after 134 years, the fact that documents proving the underwriters payment of claims could no longer be found was not enough to show an express abandonment under the "strong and convincing evidence" standard. Id. at 468.[14]

The statement of the law of abandonment by the Court in Columbus-America could not be clearer. Although the Court clearly allows for an inference of abandonment for shipwrecks which have been lost and undiscovered for some time, in a case where the original owner appears, abandonment may not be inferred, but must be proven, regardless of how long the ships have been lost, and regardless of the character of the vessel. The Columbus-America case makes no distinction between private vessels and public vessels such as warships. Because of the assertion of a universal rule of express abandonment, it is irrelevant in this case for the purpose of determining abandonment whether JUNO and LA GALGA were warships in the service of Spain at the time of their sinking.

Columbus-America is binding on this Court. Even so, this Court notes that it is not the only authority for a rule of

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14. CADG was, however, granted the right to compensation under the law of salvage, and the case was remanded for a determination of the amount of the salvage award. Id. at 468.

express abandonment when an owner of a shipwreck appears in court to make a claim. In Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the "Lady Elgin", 755 F.Supp. 213 (N.D.Ill.1990), like in Columbus-America, an insurance company claimed ownership of a shipwreck on which it had paid claims at the time of the ship's sinking, in 1860. The court in Zych found that despite the fact that the insurers never attempted to locate or salvage the wreck, there was no evidence of an affirmative act "which indicates an intent by [the insurer] to abandon the wreck," and therefore the insurers retained title to the wreck. Id. at 216. Thus, in the only two cases which the Court has located in which the owner of a shipwrecked vessel has appeared to claim ownership, a rule of express abandonment has been applied.

The implication of the Columbus-America rule in this case is that, whether or not JUNO and LA GALGA are considered warships, their owner, the Kingdom of Spain, has appeared to claim ownership to them, and therefore Sea Hunt, in pressing its claim for possession of the vessels under the law of finds, must show by "strong and convincing evidence" that the shipwrecks have been expressly abandoned by Spain. Columbus-America, 974 F.2d at 465. Unless Sea Hunt can do so, the Court must apply the law of salvage, which operates under the premise that "the original owners still retain their ownership interests in such property." Id. at 459.

IV. Applying the Express Abandonment Rule

Sea Hunt presents three grounds on which JUNO and LA GALGA have been expressly abandoned by Spain. First

is the Definitive Treaty of Peace Between France, Great Britain and Spain, Fr.-Sp.-Gr. Brit., Feb. 10, 1763, 278 Parry's Consol. T.S. 279 ("1763 Treaty"). Second is the Treaty of Amity, Settlement and Limits Between the United States of America and His Catholic Majesty (the Kingdom of Spain), U.S.-Sp., Feb. 22, 1819, 8 Stat. 252, T.S. No. 327, 11 Bevans 528 ("1819 Treaty"). The third ground is the declaration of war by Spain against the United States in 1898.

A. 1763 Treaty

The 1763 Treaty between Great Britain, Spain and France ended the Seven Years War (also called the French and Indian War), and transferred several of Spain's territories in the new world to Great Britain. Sea Hunt claims that Article XX of the 1763 Treaty constitutes an express abandonment of LA GALGA:[15]

> His Catholick Majesty cedes and guaranties, in full right, to his Britannick Majesty, Florida with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi. And, in general, everything that depends on the said countries and land, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise, which the Catholick King and the Crown of Spain have had till now over the said countries, lands,

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15. Because JUNO was not wrecked until 1802, its status is not affected by the terms of the 1763 Treaty.

> places, and their inhabitants; so that the Catholick King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner and form . . . It is moreover stipulated, that his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things.

1763 Treaty, Art. XX.[16]

This clause is a sweeping grant of territory and property from Spain to Great Britain. Spain not only gave Great Britain its claims in Florida, but also "all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi." In addition, not only the land was ceded, but "everything that depends" on the land.

These cessions were part of a wholesale redrawing of the map of North America by the three great colonial powers of 1763, Great Britain, France, and Spain. For example, in a like provision to Article XX, France ceded to Great Britain all of its possessions in Canada. See 1763 Treaty, Art. IV. France was allowed to keep its territory west of the Mississippi, including New Orleans, see Id., Art. VII, while Great Britain returned to France several islands in the Carribean which had been conquered during the preceding war. See Id., Art. VIII. In return for ceding all of Spain's

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16. The Court has not quoted parts of Article XX dealing with the right of Spanish subjects in the ceded territory to keep their personal possessions and to continue to practice Catholicism unhindered by their new government.

possessions in North American east and southeast of the Mississippi River to Great Britain, the territory of Cuba was returned to Spain. See Id., Art. XIX. Great Britain was the clear victor in North America, and the various terms of the Treaty imply that Great Britain was intended to have complete dominion over all of North America east of the Mississippi River.

The sweeping language of Spain's cession in Article XX, together with the background of the complete change of sovereignty in the North American colonies, makes it unlikely that Spain intended to, or would have been allowed by Great Britain to maintain a claim of ownership over the wreck of LA GALGA off the coast of Virginia. Spain had ceded its rights over everything it owned in North America east of the Mississippi, including its rights to sunken vessels.

Furthermore, both Spain and Great Britain actually knew where LA GALGA was located, and that it would be included in the cession of property. LA GALGA was wrecked close to land, and her captain and crew had attempted to salvage much of what was left of the ship. In addition, Captain Houny called on the Governor of the colony of Maryland for assistance in keeping away the public while salvage was taking place. However, after a second storm arose and halted salvage efforts, they were never revived.

The last sentence of Article XX reserves for the King of Spain the right to "cause all the effects that may belong to him, to be brought away, whether it be artillery or other things." As has been discussed above, Spain knew the location of LA GALGA. Yet Spain made no attempt to "bring

away" any of the remains of LA GALGA after the Treaty was signed. Thus, Spain waived the right to maintain its ownership over LA GALGA by failing to carry it away, and it was ceded with the rest of Spain's possessions to Great Britain.[17]

Article XX of the 1763 Treaty constitutes "strong and convincing evidence" under the Columbus-America standard of an express abandonment by Spain of its title to LA GALGA. LA GALGA is consequently an abandoned shipwreck, and belongs to Virginia under the terms of the Abandoned Shipwreck Act.

B. Treaty of 1819

The 1819 Treaty ended the conflict between Spain and the United States arising out of the War of 1812. The purpose of the 1819 Treaty was to "designate with precision the limits of their respective bordering territories in North America." 1819 Treaty, Preamble. The key provision of the 1819 Treaty is Article 2, which effected a transfer of territory from Spain to the United States:

> His Catholic majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the Eastward of the Mississippi, known by the name of East and

17. It is argued by Spain that the final provision of Article XX had no deadline and that the King of Spain could remove his property at any time. However, this would lead to the unlikely scenario that Great Britain intended to allow Spain to keep its "artillery and other things" in British territory indefinitely.

> West Florida. The adjacent Islands dependant on said Provinces, all public lots and squares, vacant Lands, public Edifices, Fortifications, Barracks and other Buildings, which are not private property. . . .

1819 Treaty, Article 2.[18] This provision is much narrower than Article XX of the 1763 Treaty. In the 1819 Treaty provision, Spain specifically ceded only "territories," namely Florida, and not "all that Spain possesses" as in the 1763 Treaty. Nothing in Article 2 implies that Spain has ceded anything other than territory and the structures erected on that territory. Also, even though the 1819 Treaty again uses the description of territory "Eastward of the Mississippi," similar to the 1763 Treaty, it goes ōn to clarify that the territory being described is only that which is "known by the name of East and West Florida." As JUNO is located in Virginia and not Florida it is not affected by this Treaty.[19] Thus, Spain did not expressly abandon JUNO through the 1819 Treaty.

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18. It should be noted that this is the second time that Spain has ceded Florida. Spain initially ceded Florida to Great Britain in the Treaty of 1763. During the American Revolution, however, Spain recaptured Pensacola, and all of Florida was given back to Spain by treaty in 1784. In 1819, Spain again ceded Florida, this time to the United States. See A Short History of Florida, (visited Apr. 22, 1999) TOP http://dhr.dos.state.fl.us/flafacts/shorthis.html>.

19. As LA GALGA was abandoned by the 1763 Treaty, it is not necessary to discuss its status under the 1819 Treaty. However, as it is located very near JUNO, it is clear that the two wrecks would be treated the same under this Treaty, and therefore neither was abandoned by the 1819 Treaty.

Appendix B

C. The Spanish-American War of 1898

In addition to the two treaties, Sea Hunt argues that the declaration of war between Spain and the United States in 1898 operated as an express abandonment of Spanish property in the United States. The existence of a state of war with Spain gave the United States the right to confiscate Spanish vessels in United States waters, and this right was exercised. By proclamation of April 26, 1898, President McKinley gave Spanish merchant vessels until May 21, 1898 to leave United States waters, or be confiscated:

> Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; provided that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy. . . .

30 Stat. 1770-71.

Neither party doubts that the President had the power to order confiscation of Spanish merchant vessels at the outbreak of war. There is a question, however, of whether the Untied States had the right to confiscate Spanish warships, and whether President McKinley intended to do

so through the Proclamation. Sea Hunt contends that the Proclamation issued by President McKinley did not mention warships, because it was clear under international law that warships were automatically forfeited. Spain argues to the contrary that the Proclamation did not apply to warships, as it was restrained by its language to merchant vessels. In any event, it is clear to the Court that it is within the bounds of the law to confiscate a warship or a merchant vessel belonging to the enemy during time of war. See The Panama, 176 U.S. 535, 20 S.Ct. 480, 44 L.Ed. 577 (1900); The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900); United States v. Dewey, 188 U.S. 254, 23 S.Ct. 415, 47 L.Ed. 463 (1903); See also Ware v. Hylton, 3 U.S. (3 Dall.) 199, 1 L.Ed. 568 (1796). What is equally clear to the Court is that such confiscations are not automatic; and that an enemy vessel must actually be seized in order to be forfeited.

It has long been the law in the United States that a declaration of war alone does not work to seize enemy property. In Brown v. United States, 12 U.S. (8 Cranch) 110, 3 L.Ed. 504 (1814), Chief Justice Marshall articulated that rule as follows:

> It may be considered as the opinion of all who have written on the jus belli, that war gives the right to confiscate, but does not itself confiscate the property of the enemy . . .

Id. at 125. Moreover:

> The proposition that a declaration of war does not, in itself enact a confiscation of the property of

> the enemy within the territory of the belligerent, is believed to be entirely free from doubt.

Id. at 127.

In contemporaneous cases dealing with the confiscation of Spanish vessels during the 1898 war, the vessels were explicitly captured by United States warships. See The Panama, 176 U.S. 535, 20 S.Ct. 480, 44 L.Ed. 577 (1900) (Spanish mail ship captured near Cuba by U.S. warship); The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900) (Two Spanish fishing vessels captured by U.S. blockading squadron near Cuba). Significantly, this is also the case for confiscation of enemy warships sunk in battle.) See United States v. Dewey, 188 U.S. 254, 23 S.Ct. 415, 47 L.Ed. 463 (1903) (Spanish warships during the Battle of Manila Bay raised and captured as prizes by ships of the U.S. fleet); See also United States v. Steinmetz, 973 F.2d at 217 (no such doctrine as 'constructive capture,' captor must have actual control over enemy ship to establish capture before sinking).

Whether JUNO was a warship or merchant ship is irrelevant in deciding this issue. There is no allegation by Sea Hunt that the United States had actual control over the wrecks at any time during the hostilities of 1898, or thereafter. Without such actual possession by the United States, JUNO was not abandoned by Spain during the Spanish-American War of 1898. Thus, Spain retains ownership over JUNO.

Appendix B

IV. Conclusion

Regardless of whether or not JUNO and LA GALGA are considered to be warships, they are subject to a rule of express abandonment under the Fourth Circuit's precedent in Columbus-America. Sea Hunt has succeeded in showing by "strong and convincing" evidence that, through the 1763 Treaty, Spain has expressly abandoned title to LA GALGA. Therefore, title to LA GALGA now lies with Virginia under the Abandoned Shipwreck Act, and Sea Hunt may continue with its salvage efforts according to the terms of the VMRC permits. There has been no such evidence of abandonment, however, as to JUNO. Neither the 1819 Treaty nor the declaration of war in 1898 contain any evidence of an abandonment of JUNO by Spain. Therefore Spain retains title to JUNO's wreck, and Virginia has no claim to JUNO under the Abandoned Shipwreck Act. Sea Hunt may not, without Spain's permission, continue salvage operations on the remains of JUNO.

The question remains as to whether Sea Hunt is entitled to a salvage award for JUNO under traditional salvage law. Spain has specifically indicated that it wishes to treat JUNO as a maritime grave and does not want the wreck to be salvaged. As this issue has not been fully argued by the parties, the question of whether Sea Hunt is entitled to an award under salvage law for salvage work performed on JUNO is expressly RESERVED, pending supplemental briefing by the parties. Each party to the case is ORDERED to submit a supplemental brief on the issue of whether Sea Hunt is entitled to a salvage award for JUNO within 30 days of the entry of this Order. The Court may require

further evidence concerning the extent of the salvage conducted on JUNO. Amicus United States is also granted leave to submit a brief on this issue if it so chooses.

It is ORDERED, as to Spain's Motion for Summary Judgement that Spain retains title to and ownership of JUNO, and that its claim of ownership and title to LA GALGA is DENIED and DISMISSED. It is further ORDERED that Sea Hunt's Motion for Partial Judgement on the Pleadings is GRANTED to the extent that the Commonwealth of Virginia owns and has title to LA GALGA and was acting in accord with existing authority in issuing a salvage permit to Sea Hunt for LA GALGA.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record in this case, as well as to counsel for Quicksilver.

IT IS SO ORDERED.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED SEPTEMBER 25, 1998

United States District Court,
E.D. Virginia,
Norfolk Division.

SEA HUNT, INC.,

Plaintiff,

v.

The UNIDENTIFIED, SHIPWRECKED VESSEL OR VESSELS, ETC. in rem.,

Defendant.

Civil Action No. 2:98CV281.

Sept. 25, 1998.

* * *

OPINION AND ORDER

CLARKE, District Judge.

The parties come before the Court on the United States' Renewed Motion to Intervene on behalf of the Kingdom of Spain ("Spain"), pursuant to Federal Rule of Civil Procedure 24, Supplemental Admiralty Rule (C)(6), and Local Admiralty Rules (e)(3) and (e)(13). For the reasons set forth below, the Court DENIES the motion.

Appendix C

I.

By Order of March 12, 1998, this Court issued a warrant for the arrest of the defendant vessel(s), granted Plaintiff the exclusive right to salvage the vessels, allowed sixty (60) days within which potential claimants could file claims to the vessels, and allowed twenty (20) days thereafter for parties to file answers.

On March 21, 1998, Notice of the Admiralty Arrest of the Shipwrecked Vessel(s) and Entry of Preliminary Injunction was published in the Virginian Pilot, in accordance with S.A.R. C(4) and L.A.R.(c)(3).

The United States of America ("United States") responded timely by filing a Motion to Intervene on behalf of Spain in order to assert Spain's claim of ownership over the vessels, believed to be the JUNO and LA GALGA, Spanish warships which sank in the vicinity of the salvage areas in 1802 and 1750, respectively. By Order of July 14, 1998, this Court denied the United States' motion on procedural grounds, but allowed the United States ten (10) days within which to file a proper motion to intervene. On July 22, 1998, the United States filed a Renewed Motion to Intervene together with Spain's verified claim of ownership to the vessels. Plaintiff Sea Hunt, Inc. ("Sea Hunt") now contends that the United States' renewed motion should be dismissed because of its belief that the United States lacks the proper authority to intervene in this matter as representative of Spain.

Appendix C

II.

The United States takes the unique position in this case of holding itself out as counsel for Spain. The Court has been unable to uncover any precedent for this position, and the United States has cited none. Only one case seems to contain an analogous situation. In The Amistad, 40 U.S. (15 Pet.) 518, 10 L.Ed. 826 (1841), the United States sought to intervene under a previous treaty with Spain[1] in order to exert Spain's claim over a Spanish owned vessel which had been transporting African natives as part of an illegal slave trade. The Spanish minister in The Amistad:

> had officially presented to the proper department of the government of the United States, a claim for the restoration of the vessel, cargo, and slaves, as the property of Spanish subjects, which had arrived within the jurisdictional limits of the United States, and were taken possession of by the said public armed brig of the United States; under such circumstances as made it the duty of the United States to cause the same to be restored to the true proprietors, pursuant to the treaty between the United States and Spain: and praying the Court, on it being made legally to appear that the claim of the Spanish minister was well founded, to make such order . . . as would best enable the United States to comply with their treaty stipulations.

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1. Treaty of Friendship, Limits, and Navigation, October 27, 1795, U.S.-Sp., 8 Stat. 138.

Id. at 588. The United States claimed "a right to intervene in the manner in which they have done, to obtain a decree for the restitution of the property, upon the application of the Spanish minister," a position which was "strenuously" objected to by the opposition. Id. at 591. However, because the Court decided the case in favor of the African "slaves" on board and against the Spanish owners of the vessel, it became "wholly unnecessary for [the Court] to give any opinion upon the other point, as to the right of the United States to intervene in this case in the manner already stated." Id. at 597. Because the Court in The Amistad did not reach a conclusion on the issue of the United States representation of Spain, it provides minimal guidance in this case, and it remains the duty of this Court to evaluate the issue as one of first impression.

A.

The United States relies on the language in Article X of the Treaty of Friendship and General Relations between the United States and Spain ("Treaty"). Article X reads as follows:

> In case of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other, whether belonging to the State or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases.

Treaty of Friendship and General Relations, July 3, 1902, U.S.-Sp., 33 Stat. 2105.

The Court does not read that language as granting the United States authority to represent Spain's interests as its attorney in a court of the United States. Instead, this is merely a reciprocity provision, common to many international agreements, which provides that a Spanish ship in peril in United States waters shall have available the same rights and remedies that a United States ship would have in Spanish waters. See Nicholas E. Vernicos Shipping Co. v. United States, 349 F.2d 465 (2nd Cir.1965). Nothing in the language of Article X of the Treaty transfers any rights over the vessels to the United States, nor does it provide authorization for the United States to represent Spain's interest in an admiralty proceeding.

In fact, under the Treaty, Spain has the right to represent itself in this litigation. Article VI of the Treaty states:

> The citizens or subjects of each of the two High Contracting Parties shall have free access to the Courts of the other, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of their rights, in all the degrees of jurisdiction established by law. They can be represented by lawyers, and they shall enjoy . . . the same rights and the same advantages which are or shall be granted to the citizens or subjects of the most favored Nation.

Id. Article XXI of the Treaty states that:

> The Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two High Contracting

> Parties, shall have the right to address the authorities of the respective countries, national or local, judicial or executive . . . for the purpose of complaining of any infraction of the treaties or conventions existing between the two countries, or for the purpose of information, or the protection of the rights and interests of their countrymen, whom, if absent, such consular officers shall be presumed to represent . . . .

Id. Taken together, these provisions grant Spain nothing more than the same rights before the Court as any United States citizen. Nothing in these Treaty provisions implies that the United States can or must represent Spain's interests in this action.

B.

The United States also relies on a May 8, 1998 Verbal Note transmitted from the Spanish Embassy in Washington to the Department of State, allegedly asking the United States to act as counsel on Spain's behalf. Paragraph 3 of the note requests that:

> In accordance with Article 10 of the Treaty of Friendship between Spain and the United States signed in 1903, the Embassy of Spain requests that the competent authorities take the necessary steps to ensure the above including those related to the Federal Court of the State of Virginia involved, and grant to these vessels the same assistance, protection and immunities that

> shipwreck (sic) property of the United States would merit.

Verbal Note, May 8, 1998 (translation). While this note does request the United States' assistance under the Treaty, it does not grant authority for the United States to serve as Spain's counsel, nor does it transfer any interest or title in the wrecks to the United States so that it could exert its own claim. It simply asks that the "competent authorities" take the necessary actions to ensure Spain's claims are heard.

A Court has already examined the meaning of the term "competent authorities" in relation to the 1902 Treaty between the United States and Spain. In United States v. Mason, 344 F.2d 673 (2nd Cir.1965), Spanish officials invoked Article XXIV of the Treaty to have the United States Navy and the Immigration Service detain an alleged deserter from the Spanish Navy. Under Article XXIV (since revoked), the power to arrest and detain deserters was given to "competent national or local authorities." Id., at 676. The court held, however, that the Navy and the Immigration Service had no such competence, unless conferred by law separate from the Treaty. Id. at 682. Thus, "competent authorities" as mentioned in the Verbal Note in relation to the Treaty has no meaning absent some other enabling legislation. The United States makes no mention of such a statute to confer on the Department of Justice the ability to represent Spain's interests under the Treaty in court.

Thus, neither the Treaty itself nor the Verbal Note from Spain invoking the Treaty contains language sufficient to support the United States intervention on behalf of Spain as

its attorney in this case. However, the inquiry does not end there.

III.

That a foreign government may request the assistance of the United States in a court appearance through diplomatic channels is one of the oldest principles of law in the United States. See The Cassius, 2 U.S. (2.Dall.) 365, 1 L.Ed. 418, 14 F. Cas. 431 (1796); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812). This posture has most often been taken by foreign governments in cases involving the assertion of sovereign immunity previous to enactment of the Foreign Sovereign Immunity Act in 1976. See 28 U.S.C. § 1604.

A.

Generally, a foreign government had three options in making an immunity claim in a United States court. First, Ambassadors or other consulate officials could appear in person on behalf of the sovereign they represented. Second, the sovereign could have "its accredited and recognized representative" appear on its behalf. The final option was to make a claim to the Department of State, which, if it supported the foreign sovereign's claim, would make "an appropriate suggestion to the court by the Attorney General, or some other law officer acting under his direction." In re Muir, 254 U.S. 522, 532-33, 41 S.Ct. 185, 187, 65 L.Ed. 383 (1921). This suggests that if the United States desires to intervene, the proper way to do so is through a "suggestion" or an amicus curiae brief, not by intervening directly as counsel for the foreign sovereign.

The United States, however, is under no obligation to make a suggestion on behalf of a foreign sovereign. In fact, the United States has declined to represent Spain in an action similar to this one, even though the same Treaty on which the United States now relies was in force then. In The Navemar, 303 U.S. 68, 58 S.Ct. 432, 82 L.Ed. 667 (1938), Spain sought to make a claim of ownership to a vessel which had been libeled in admiralty in the District Court for the Eastern District of New York. Spain requested assistance by the United States, but, the Department of State:

> declined to honor the request of the Ambassador [of Spain] that representations be made in the pending suit by the Attorney General of the United States in behalf of the Spanish government, and . . . advised the Ambassador that his government was entitled 'to appear directly before the court in a case of this character.'

Id. at 433, 71. The United States in The Navemar apparently did not feel compelled by the Treaty of Friendship and General Relations to make any representations at all before the court, much less to serve as Spain's counsel, and correctly advised Spain to make an appearance on its own.

B.

The United States contends that its own interests are at stake in this matter, and that it may intervene as a matter of right pursuant to Fed.R.Civ.P. 24. The United States is concerned primarily about its "treaty implementation responsibilities" and the desire to ensure that, should a case

arise in a foreign jurisdiction concerning a United States warship, the United States will be treated fairly. Even if these are valid interests, intervening in this case as counsel for Spain is not the proper way to assert them. In other cases of similar, or greater international importance, the United States has filed separately, on its own behalf, as amicus curiae.

In Republic of Argentina v. City of New York, 25 N.Y.2d 252, 303 N.Y.S.2d 644, 250 N.E.2d 698 (N.Y.1969), Argentina brought suit against the City of New York claiming that its consulate offices in New York City were exempt from the city's property tax. The United States, arguing as amicus curiae, claimed that:

> [t]axation by political subdivisions of the United States of foreign government-owned real property used for official purposes has been a growing irritant in the conduct of the foreign relations of the United States. It left unchecked (sic), such taxation will prejudice and hamper the effective conduct of our foreign relations.

Id. at 700. The Court noted that, because of the large number of consulates and other offices it maintained abroad, the United States had a real interest in the litigation. Id. at 700 n. 2. However, the United States chose to intervene in that case on its own behalf as an amicus party rather than directly as an attorney on behalf of Argentina. In Jackson v. People's Republic of China, 794 F.2d 1490 (11th Cir.1986), China challenged a default judgment for failure to respond to a claim brought by holders of bonds issued by the Imperial Chinese government in 1911. China pressured the United

States to take action, stating through diplomatic channels that it regarded the default judgment "as a serious matter and a major irritant in bilateral relations with the United States," and threatening to "take corresponding measures" if any of its property was attached to enforce the judgment. Id. at 1495-96. The United States, instead of volunteering to represent China to ensure good relations, advised China to "retain counsel to appear in the district court and urge sovereign immunity and any other defenses." Id. at 1495.

The United States then filed a statement of interest on its own behalf, arguing that allowing China "to have its day in court will significantly further United States foreign policy interests; conversely denying it that day in court is likely to have a negative impact on United States interests." Id.

At no time in Jackson did the United States seek to appear as counsel for China, despite the important national interests at stake. Jackson provides an outline of the path which the United States should have followed in the present action pending before this Court.

IV.

Finally, the United States claims that it may appear as representative of Spain in this case under 28 U.S.C. § 517, which states that:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the

> United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C.A. § 517 (West 1993). This Court does not agree that this statute grants authority for the Department of Justice to represent Spain. The United States has no real interest in the shipwrecks at issue in this case. If this Court finds that they are abandoned, then they belong to the Commonwealth of Virginia under the Abandoned Shipwreck Act. See 43 U.S.C. § 2105. If this Court finds that the ships have not been abandoned, then they belong to the Kingdom of Spain. In either instance, the United States' interests are not at stake.

The United States also argues, however, that it has in interest in this action based on its "treaty implementation responsibility," that is, if the United States does not uphold its treaty obligations to Spain in this case, Spain will likely not uphold its obligations to the Untied States in the future. The Court does not doubt that this is true, but, as has been discussed above, the proper way for the United States to assert its interest is through an amicus brief or a statement of interest on its own behalf, not intervening as counsel for Spain. In addition, the only treaty responsibility the United States has is to grant Spain the same rights and remedies as a United States citizen would have. The United States has met that responsibility by allowing Spain to come before the Court, and Sea Hunt has conceded that Spain has the right to make a claim in this case. Thus, the United States has no remaining interest to assert in this matter.

Appendix C

V.

For the foregoing reasons, the Court hereby DENIES the renewed motion to intervene filed by the United States acting as attorney on behalf of the Kingdom of Spain. Because the Kingdom of Spain has been improperly represented by the United States in this matter, the Court will disregard all pleadings heretofore filed on Spain's behalf by the United States. The Court GRANTS the Kingdom of Spain ninety (90) days to obtain other counsel or make an appearance on its own behalf in order to properly assert its claims in this case.

The clerk is DIRECTED to mail a copy of this Order to counsel for the United States, counsel for Sea Hunt, Inc., and pursuant to the Foreign Sovereign Immunity Act and The Hague Convention on Service Abroad of Judicial and Extra Judicial Documents, to the following officials for the Kingdom of Spain:

1. Secretaria General Tecnicia Subdireccion de Cooperacion Juridica Internacional Ministerio de Justicia San Bernardo, 45. 28015 Madrid, Spain

2. His Excellency Antonio Oyarzabal Embassy of Spain 2375 Pennsylvania Avenue, N.W. Washington, D.C. 20037.

IT IS SO ORDERED.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED SEPTEMBER 23, 1998

United States District Court,
E.D. Virginia,
Norfolk Division.

SEA HUNT, INC.,

Plaintiff,

v.

The UNIDENTIFIED, SHIPWRECKED VESSEL OR VESSELS, etc. in rem.,

Defendant.

CIV. A. No. 2:98CV281.

Sept. 23, 1998.

* * *

OPINION AND ORDER

CLARKE, District Judge.

The parties come before the Court on the motion of Sea Hunt, Inc. ("Plaintiff") to strike and dismiss the United States' Motion to Intervene as to its Regulatory Authority, pursuant to Federal Rule of Civil Procedure 24, Supplemental

Admiralty Rule (C)(6), and Local Admiralty Rules (e)(3) and (e)(13). For the reasons set forth below, the Court GRANTS the motion.

I.

By Order of March 12, 1998, this Court issued a warrant for the arrest of the defendant vessel(s), granted Plaintiff the exclusive right to salvage the vessels, allowed sixty (60) days within which potential claimants could file claims to the vessels, and allowed twenty (20) days thereafter for parties to file answers.

On March 21, 1998, Notice of the Admiralty Arrest of the Shipwrecked Vessel(s) and Entry of Preliminary Injunction was published in the Virginian Pilot, in accordance with S.A.R. C(4) and L.A.R.(c)(3).

The United States of America ("United States") responded timely by filing, on its own behalf, a Motion to Intervene to assert its authority to regulate the activities on the waters off the shore of Assateague Island where the sunken vessels are allegedly located. By Order of July 14, 1998, this Court denied the United States' motion on procedural grounds, but allowed the United States ten (10) days within which to file a proper motion to intervene. On July 22, 1998, the United States filed a Renewed Motion to Intervene to defend its regulatory authority over navigable waters. Plaintiff now contends that the United States' renewed motion should be dismissed because the motion is unverified and in violation of Federal Rule of Civil Procedure 24, Supplemental Admiralty Rule (C)(6), and Local Admiralty Rules (e)(3) and (e)(13).

Appendix D

II.

Although Plaintiff brings this motion based on alleged procedural deficiencies, the Court does not decide whether the United States should have complied with the cited Admiralty rules because as a threshold matter, the Court FINDS that the United States has not met the necessary requirements either for intervention as of right pursuant to Federal Rule of Civil Procedure 24(a)(2) or for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(2).

A.

A person or entity seeking intervention as a matter of right must show three things: (i) an interest in the subject matter of the suit; (ii) that the protection of this interest would be impaired because of the suit; (iii) that the intervenor's interest is not adequately represented by existing parties to the litigation. Teague v. Bakker, 931 F.2d 259, 260 (4th Cir.1991) (citing Virginia v. Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir.1976)).

Since the United States has failed to show an interest in the subject matter of this in rem action, it has failed to meet the requirements for intervention as of right.

The Plaintiff has called upon this Court to determine only the rights of ownership and the rights of salvage of the sunken vessels, nothing more. The subject matter of this action, therefore, is the sunken vessels lying off the shore of Assateague Island. The United States has made it clear to

the Court that it has no interest in asserting a claim against those vessels. On brief and in oral argument, the United States has argued repeatedly that it does not seek to assert any claim of ownership or salvage rights against the sunken vessels, stating explicitly that "the [National Park System] does not seek to assert any claim whatsoever over the subject vessels or their property." Memorandum in Opposition to Motion to Strike and Dismiss at 5.

The United States argues, rather, that it has a right to intervene because the Plaintiff has included in its Verified Complaint a prayer for declaratory relief that, according to the United States, implicates the United States' interest in regulating boating activity on the navigable waters above the location of the sunken ships. The United States asserts that it has a right to intervene in order to protect this interest.

This might be so if the Plaintiff's prayer for a declaratory judgment implicated the same interest that the United States wishes to defend. It does not. The language of the prayer for declaratory relief reads, in pertinent part, as follows:

> . . . (b) . . . that no other government other than the Commonwealth of Virginia — whether the United States or any foreign sovereign — has the jurisdiction or authority to issue any permit for the exploration for and/or recovery of the Shipwrecked Vessel(s) or to grant, condition or deny the right of any Commonwealth permittee to do so within the territorial waters of the Commonwealth . . .

Verified Complaint In Admiralty In Rem at 9.

Appendix D

The language employed by the Plaintiff asks the Court to determine which government agency has the exclusive right to decide which salvor will be permitted to explore and salvage the sunken vessels. The Plaintiff is not, as the Court understands it, seeking a declaration that the United States is without authority to regulate the surface activities and uses of the navigable waters where the vessels are located. Therefore, the United States, claiming to have no interest in who will or will not be allowed to salvage the vessels, has no interest to protect with regard to the Plaintiff's prayer for a declaratory judgment. Since this in rem action concerns only the issues of ownership and salvage rights, and the United States concedes that as far as its regulatory claim is concerned, it has no interest in either of those issues, the United States may not intervene as of right under F.R.Civ.P. 24(a)(2).

B.

Under the same reasoning set forth above, the United States may not intervene in this case under the Federal Rules' provision for permissive intervention. F.R.Civ.P. 24(b)(2). The United States' interests in enforcing boating regulations are entirely separate and apart from the ownership and salvage interests that form the basis of this action. There are simply no questions of law or fact in common and therefore permissive intervention is not proper either.

III.

The Court's conclusion that the United States has no interest in the subject matter of this suit and may not intervene

should not be construed to mean that the United States has no interest either in regulating the boating activities of the Plaintiff or anyone else, or in preventing obstructions to navigation on the waters over the sunken vessels in question.

It is well settled law that "Congress has extensive authority over this Nation's waters under the Commerce Clause. Early in our history [the Supreme Court] held that the power to regulate commerce necessarily includes power over navigation." Kaiser Aetna v. United States, 444 U.S. 164, 173, 100 S.Ct. 383, 389, 62 L.Ed.2d 332 (1979) citing Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L.Ed. 23 (1824). The Supreme Court has more fully explained the breadth of this power to control navigation by stating that, "[t]he states possess control of waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the constitution in regard to commerce and the navigation of the waters of rivers.' " United States v. Appalachian Electric Power Co., 311 U.S. 377, 405, 61 S.Ct. 291, 298, 85 L.Ed. 243 (1941) (citing St. Anthony Falls Water Power Co. v. Water Commissioners, 168 U.S. 349, 366, 18 S.Ct. 157, 164, 42 L.Ed. 497 (1897)). Congress, of course, may delegate this power to regulate navigation to the federal government agencies it chooses. In this case, Congress has delegated its regulatory authority over the waters off Assateague Island to the National Park System through creation of the Assateague Island National Seashore. 16 U.S.C.A. § 459f, et seq.

At this time, actual ownership of the sunken vessels has not been determined. Actual ownership of the vessels, however, is irrelevant to the existence of the United States'

power to regulate the boating activities and obstructions on the surface navigable waters above the sunken vessels. Even if the Court were ultimately to decide, though it does not do so now, that the Commonwealth of Virginia actually owns the sunken vessels, such a decision would not change the fact that the United States has the power to regulate activities on the navigable waters above the sunken vessel. Congress has retained its plenary authority over navigation of these navigable waters under the Commerce Clause. Just as in cases involving the Property Clause, this authority is unaffected by the fact that the United States may have ceded to the Commonwealth of Virginia ownership of lands three miles seaward from the state or ownership of abandoned shipwrecks within those three miles. See, e.g., United States v. Brown, 552 F.2d 817 (8th Cir.1977), cert. denied, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977) (under Property Clause, Congress can regulate waters beyond territorial limits of United States' actual ownership)

IV.

Finally, the Court FINDS that the injunction currently in place does not affect the power of the United States to regulate its navigable waters. Since the Court has found that the United States cannot properly intervene in this particular proceeding either to assert or defend its regulatory interest, the question of whether the United States complied with the procedural mandates is moot. Furthermore, the United States' motion to modify the preliminary injunction is likewise moot.

The Court notes that its decision that the United States may not intervene in this case on its own behalf does not

render the United States unable to protect its interests in regulating the navigable waters in question. If the United States government finds that the Plaintiff or any other party who might intervene and establish a salvage right to the vessels is interfering with or affecting navigation around the site of the sunken vessels, then the United States may take appropriate legal steps at that time to require the salvor to cease such activity and comply with the United States' regulations.

V.

For the foregoing reasons, the Plaintiff's Motion to Dismiss the United States of America is GRANTED and the United States of America's Motion to Intervene as to Its Regulatory Authority is DISMISSED.

The Clerk is DIRECTED to mail a copy of this ORDER to counsel for Plaintiff, counsel for the United States, and the attorneys who contend that they are representing the Kingdom of Spain.

IT IS SO ORDERED.

(2) (2)

Nos. 00-652 & 00-629

Supreme Court, U.S.
FILED
DEC 18 2000
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SEA HUNT, INC.,

Petitioner,

v.

SPAIN,

Respondent,

and

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

SPAIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE AMICI CURIAE PROFESSIONAL SHIPWRECK EXPLORERS ASSOCIATION, HISTORIC SHIPWRECK SALVAGE POLITICAL ADVISORY COMMITTEE, MEL FISHER ENTERPRISES, OLD WORLD SEARCH & RECOVERY, INC., SOUTHLAND MARINE, INC., COBB COIN COMPANY, INC., INTERSAL, INC., ENTERPRISE MARINE SERVICES, INC., QUICKSILVER INTERNATIONAL, INC., DEEP SEA RESEARCH, INC., AND LADY ELGIN FOUNDATION IN SUPPORT OF THE PETITION

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professional companies and/or organizations engaged in the search for and recovery of historic shipwrecks and their cargo. The unprecedented Fourth Circuit Court of Appeals decision--deciding title prior to determining salvage rights, recognizing Spanish ownership of the long-lost shipwrecks, *LA GALGA* and *JUNO*, and permitting a sovereign not in actual possession thereof to prohibit their salvage--destroys the uniformity of admiralty law as unanimously established by this Court in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (*"DSR"*).

Amici urge the Supreme Court to grant *Certiorari* as they have a vested interest in the predictability and uniformity of admiralty law and in the protection of the traditional--indeed, ancient--freedom of the seas to search for and rescue lost property from marine peril. A more

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[1] Pursuant to Supreme Court Rule 37.6, this brief was entirely written and paid for by *amici* and/or its counsel. Pursuant to Rule 37.3(a), *amici* have obtained the written consent of the parties for permission to file this brief.

detailed description of the individual *amici* is set forth in Appendix A.

II. SUMMARY OF ARGUMENT

Two years ago, in *DSR, supra.*, this Court established uniformity in this contentious realm of admiralty law, ruling unanimously that a sovereign--including the King of Spain--that did not have actual possession of a wreck site could not interfere with the finder's right to salvage it. 523 U.S. at 496-8. *DSR* clearly and unequivocally established that the first issue to be addressed in such litigation is the question of salvage rights. It is only after the completion of recovery operations that title to the shipwreck and its cargo--i.e., abandonment--is to be addressed. *Id.*

The decision below by the Fourth Circuit--and a nearly identical one by the Eleventh Circuit in *International Aircraft Recovery, LLC v. Wrecked and Abandonded Aircraft*, 218 F.3d 1255 (11th Cir. 2000), *Cert. pending*, No. 00-617--turns the unanimous *DSR* precedent on its

head, destroying the essential uniformity of admiralty law while thumbing its nose at the Supreme Court.

The very fact that four (4) separate petitions for *certiorari* have been filed this term on this very issue[2] demonstrates the importance of granting the instant petition and in no uncertain terms, reaffirming the uniformity of federal admiralty law as set forth by this Court in *DSR*.

ARGUMENT

III. THE FOURTH CIRCUIT'S DECISION DESTROYS THE UNIFORMITY OF ADMIRALTY LAW AS ESTABLISHED BY THIS COURT IN *DEEP SEA RESEARCH*

In *DSR*, an unanimous Supreme Court swept away a decade of confusing precedent in reaffirming a venerable, bright-line rule: where the property is *not in the actual possession* of the sovereign, that sovereign--be it a U.S. state, the federal government or U.S. Navy, or even a foreign nation like Spain--cannot interfere with the salvor's *in rem* salvage action. *DSR, Id.*

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[2] The other petitions, for which *certiorari* has been denied, are *Columbus-America Discovery Group, Inc. v. Atlantic Mutual Ins. Co., et al.*, No. 99-1935, *Cert. den.* 121 S.Ct. 277 and *Yukon Recovery, LLC v. Ocean Mar, Inc.* , No. 99-1958, *Cert. den.* 121 S.Ct. 62.

In contravention of this Court's clear rule, two appellate courts have each since permitted a sovereign claimant *without actual possession* of the wrecksite to enjoin the salvor in possession from carrying forward its recovery operations. In *International Aircraft Recovery, LLC v. Unidentified, etc. Aircraft*, 54 F.Supp.2d 1172 (S.D.Fla. 1999), the district court had found that the even if the United States Navy were still the owner of a rare World War II torpedo bomber found in international waters, it could not refuse its salvage: "[N]umerous cases hold that an owner may not refuse salvage services if no other provisions for rescue has been made and marine peril exists." *Id.* at 1179. More fundamentally, the district court noted that in light of *DSR*, it could not be disputed that "...the issue of abandonment and ownership are secondary to the question of whether this Court can protect the Plaintiff's ongoing federal salvage rights." *Id.* at 1179.

In reversing the district court, the Eleventh Circuit ignored any analysis of this Court's *DSR* decision, summarily dismissing the issue of sovereign possession

because it was not an Abandoned Shipwreck Act ("ASA") case!*Int'l Aircraft*, 218 F.3d at 1260. *But see, Sea Services of the Florida Keys, Inc. v. State of Florida*, 156 F.3d 1151, 1153 (11th Cir. 1998) [Florida cannot interfere with salvor's possession].

Of course, this Court's analysis made no such distinction: the rule applies to *any* claim asserted by *any* sovereign *without actual possession* of the property whose salvage is at issue. *DSR*, *supra.* at 496-8. It is undisputed that neither *LA GALGA* nor *JUNO* have been in the possession of Spain for well over two centuries. Nevertheless--without citing or in any way distinguishing *DSR*--the Fourth Circuit allowed Spain to refuse salvage and allowed no salvage award. *Sea Hunt*, 221 F.3d at 647-648. This is plain error.

The district court had also ruled that a non-possessing sovereign could refuse salvage--but cited cases finding abandonment of Spanish shipwrecks! *Sea Hunt*, 1999 U.S. Dist. LEXIS 21752 (E.D.Va. 1999). In each of

these cases[3] the owner was the state or federal government in whose submerged lands an *abandoned* Spanish shipwreck had been found. But this supports Virginia's and Sea Hunt's position that Spanish shipwrecks off the coast of North America have been abandoned. The cases *do not* support Spain's assertion that it can reject Sea Hunt's salvage of *LA GALGA* and *JUNO* where Spain: 1) does not possess them; 2) does not know where the shipwrecks are (like California in *DSR*); and, 3) has neither the wherewithal nor intent to rescue their remnants from the marine peril in which Sea Hunt has discovered them.

Ironically, only a year before its *Sea Hunt* decision, the Fourth Circuit ruled that, [T]he law of salvage presumes that the owner desires the salvage service." *RMS Titanic, Inc. v. Haver*, 171 F.3d 943, 963 (4th Cir. 1999). Presumptions notwithstanding, this Court has made it clear that irrespective of the King of Spain's desires, he cannot

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[3] *See, Platoro,* 695 F.2d 893, 901 (5th Cir. 1983); *Lathrop v. Unidentified, etc. Vessel.* 817 F.Supp. 953, 964 (MD Fla. 1993); *Klein v. Unidentified Vessel,* 758 F.2d 1511, 1515 (11th Cir 1985); *Jupiter Wreck, Inc v. Unidentified Vessel,* 691 F.Supp. 1377, 1389 (SD Fla 1988).

unilaterally enjoin the salvage of the shipwreck sites that Sea Hunt has discovered and has maintained in its exclusive possession. *DSR*, 523 at 496-8.

IV. SPAIN CANNOT ASSERT OWNERSHIP OF UNIDENTIFIED SHIPWRECK SITES

Like *DSR, supra.* at 1469, *Sea Hunt* comes before the Court with a sparse, almost nonexistent record: there had been no discovery, no evidentiary hearings were held, and almost no testimony whatsoever was taken or otherwise a basis for the decision.

Although *DSR* was ultimately remanded to the district court to address the ultimate issue of the shipwreck's abandonment, the preliminary issue of salvage rights was fully adjudicated by the Court. In *Sea Hunt,* on the other hand, non-abandonment by Spain was found and the salvor in possession ordered not to knowingly disturb Spain's property (wherever that might be). 221 F.3d at 647.

Amici are troubled by the "rush to judgment" nature of the *Sea Hunt* litigation. Having disposed of the issue of the abandonment of *LA GALGA* pursuant to the 1763 Treaty between Great Britain and Spain, *Sea Hunt,* 17 F.Supp.2d at 688-690, the case was then set for further briefing on the question of Sea Hunt's salvage rights and the award due it with respect to the discovery of *JUNO*. But the court did not convene any hearing to assess the quantum of the salvage award due. Nor was any testimony taken as to the identity and physical parameters of the wreck site. Indeed, what little testimony of record there is on *JUNO* comes from Sea Hunt President Benson's statements made at the *ex parte* admiralty arrest hearing on March 11, 1998 (J.A. at 69-75, 82) and again briefly during a September 15, 1998 hearing. Nevertheless, the evidence established that Sea Hunt had spent two years and over one million dollars using overseas archival researchers, archaeological consultants and state of the art technology in the search for and preliminary identification of wreck sites believed to be *LA GALGA* and *JUNO*.

The few artifacts recovered from the *JUNO* site include an encrusted anchor, a corroded cannon, and several conglomerates that have yielded an assortment of objects, including several Spanish silver coins, none of which postdate the 1802 sinking of *JUNO*. This paucity of evidence cannot support a conclusive finding that either *LA GALGA* or *JUNO* has been discovered. Nevertheless, the Fourth Circuit affirmed a zero percent (0%) salvage award without comment.[4] 221 F.3d at 647-8.

This is hardly the sort of evidence necessary to substantiate a claim of discovery of a particular historic shipwreck. The district court was not satisfied that the Spanish treasure galleon *ATOCHA* had been discovered without reviewing the results of decades of onsite searching and diving, the recovery of literally tens of thousands of artifacts, and ultimately, the matching of several of those

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[4] This is yet another example of the lack of uniformity mischief that ensues when Circuit Courts fail to follow Supreme Court precedent: in *Int'l Aircraft Recovery, supra.*, 218F.3d at 1263-4, the Eleventh Circuit remanded for a salvage award adjudication under identical circumstances where the Fourth Circuit denied *any* salvage award for millions of dollars spent by Sea Hunt in locating (but not yet positively identifying) "Spanish" shipwrecks.

items with their description, serial number and weight as found on the ship's original cargo manifest. *Treasure Salvors, Inc. v. Unidentified, etc. Vessel*, 549 F.Supp. 919, 924-26 (S.D. Fla. 1981).

At best, Sea Hunt can only conclude that the wreck sites it has discovered are promising and may--at some time in the future--prove to be the long-lost Spanish frigates. For Spain to be satisfied that *JUNO* has been found at this preliminary juncture is even more mystifying. Spain has never had any divers visit either Sea Hunt site and has performed no archaeological research or examination of the artifacts recovered therefrom, either. In fact, Spain has no basis to assert, as it has, that Sea Hunt--as opposed to Quicksilver, Inc.--is the true finder of *JUNO*.

In *DSR, supra.* this Court established the procedures to be followed in adjudicating the salvage rights to an historic shipwreck. Inferior courts should not be permitted to bypass the initial question of salvage rights and then--in

the absence of any evidentiary hearing whatsoever--jump to a conclusion as to the identity of the shipwreck sites.

Moreover, the record is void of the evidence ordinarily compiled in assessing the salvage award due the finder. In *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., et al.*, 974 F.2d 450, 468-69, (4th Cir. 1992) (*"CADG"*), the Fourth Circuit remanded the case to the district court for a full evidentiary hearing on the quantum of the salvage award to be paid to the intrepid finders of the S.S. *CENTRAL AMERICA*. The Court noted that six ingredients of the salvage award come from *The BLACKWALL*, 77 U.S. (10 Wall.) 1, 13-4 (1869), and assess the salvor's labor and skill, the cost and difficulty of the operations, the degree of danger encountered, and the value of the property saved. There is virtually no testimony on record whatsoever as to any of these factors in the *Sea Hunt* litigation.

Following such an evidentiary hearing in *CADG*, the appellate court affirmed a salvage award to the plaintiff

salvor of 90% of the value of the insured shipments of gold recovered from the *CENTRAL AMERICA*. *CADG II*, 56 F.3d 556, 562 (4th Cir. 1995). Compare and contrast the voluminous record before both the district court and the Fourth Circuit which supported this unprecedented--but fully justified--salvage award with the utter lack of evidence to support its equally unprecedented salvage award of *zero* percent (0% (!)) granted to Sea Hunt.

At a minimum, if this Court is satisfied with Spain's conclusion that *JUNO* has been discovered by Sea Hunt, a remand for an full evidentiary hearing on the salvage award due Sea Hunt is required. Because it cannot be disputed that Spain does not have possession of the *JUNO* site, this salvage hearing cannot take place until Sea Hunt has completed its archaeological recovery operations.

V. THE FOURTH CIRCUIT'S UNIQUE TEST FOR ABANDONMENT IMPERILS THE UNIFORMITY OF U.S. ADMIRALTY LAW

With the sole exception of the decisions below in the instant litigation--U.S. admiralty courts have uniformly found that Spanish shipwrecks have long since been aban-

doned: "disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches the fiction to absurd lengths." *Treasure Salvors, Inc. v. Unidentified, etc. Vessel,* 569 F.2d 330, 337 (5th Cir. 1978)[1622 galleon *ATOCHA* abandoned]; *See also, Treasure Salvors v. Jordan,* 556 F.Supp. 1319, 1325 (S.D. Fla. 1983) [1622 galleon *MARGARITA* abandoned].

These contested cases finding abandonment of Spanish shipwrecks include: the 1554 Spanish fleet lost off Padre Island, Texas [*Platoro v. Unidentified Remains,* 614 F.2d 1051, 1055 (5th Cir. 1980)]; the 1690 Manila galleon *PILAR,* lost off Guam [*Marx v. Government of Guam,* 866 F.2d 294, 300 (9th Cir. 1988]; a late seventeenth century shipwreck wrecked off Jupiter Inlet, Florida [*Jupiter Wreck, supra.*]; the 1715 Plate Fleet off Florida's "Treasure Coast" [*Cobb Coin Co., Inc. v. Unidentified, etc. Vessel,* 525 F.Supp 186, 197 (S.D. Fla. 1981)]; the 1733 Fleet in Florida's Middle Keys [*MDM Salvage v. Unidentified, etc. Wreck,* 631 F.Supp. 308, 310 (S.D. Fla. 1986)]; three eighteenth century Spanish shipwrecks abandoned in

Maryland's territorial water--including *LA GALGA*! [*Subacqueous Exploration & Archeology, Inc. v. Unidentified Vessel*, 577 F.Supp. 597, 600 & n.2 (D.Md. 1983)]; an unidentified Spanish wreck from the 1770's discovered in Cape Canaveral National Seashore [*Lathrop, supra.* at 965]; and even an unidentified Spanish wreck of unknown vintage [*Lopez Soba v. Fitzgerald*, 1993 AMC 120 (P.R. 1992)].[5]

These judicial conclusions were not a surprise to Spain. Indeed, in 1965, its own U.S. Ambassador admitted that Spain had lost its claim to the shipwrecked 1715 fleet when it abandoned any attempt at recovery; now its ownership was strictly a matter of Florida law. J.A. 348, appended hereto at Appendix C.

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[5] British warships of similar vintage have uniform-ly been deemed abandoned. *See, Deklyn v. Davis*, 1 Hopk. Ch.154, 162 (N.Y. Ch. 1824) [1782 British frigate *HUSSAR* abandoned in New York's "Hell Gate"]; *Sub-Sal, Inc. v. HMS DEBRAAK*, C.A. No. 84-296-CMW (D.Del. 1992)[1798 British Brig-of-War HMS *DEBRAAK* abandoned off Cape Henlopen, DE]. And as recently as this month, the District of Rhode Island found an entire fleet of British warships sunk in Naragansett Bay to have been abandoned and thereby the property of Rhode Island pursuant to the Abandoned Shipwreck Act, 43 U.S.C. §2101 *et seq. State of Rhode Island v. Unidentified, etc Vessels*, C.A. No. 99-136T (D.R.I. Dec 1, 2000) [Appended hereto as Appendix B].

The Ambassador's reasoning is equally applicable to *LA GALGA*. Spain never asserted title to the sunken frigate when it was allegedly discovered off Ocean City, Maryland in *Subacqueous, supra*. Its Captain Houny returned to the wreck site, only to find "a late Storm having broke the Hull to Pieces" with its cargo of mahogany cast ashore and heavily salvaged by the locals. Houny recovered what he could from the wreck site; since further efforts were futile, the Spanish captain abandoned any attempt to salvage *LA GALGA*, thereby giving up any future claim by that sovereign to its shattered hull and cargo.

Title to *LA GALGA* need not turn upon modern interpretation of archaic treaty language, assessing the legal consequences of multiple wars and peaces between Spain and the United States, or even in judicial scrutiny of arcane arenas of international law. Admiralty law has always heretofore taken a common sense approach to the concept of abandonment: when the owner knows of the location of his property and has the technology reasonably at hand with which to recover it, but does not, it is considered to have been legally abandoned.

Thus, in *Fairport International Exploration, Inc. v The CAPTAIN LAWRENCE,* 72 F.Supp.2d 795, (W.D. MI 1999), a shipwreck dashed to pieces on an island was deemed abandoned--and hence, state property--after the owner made no salvage effort for decades. *See also, Wiggins v. 1100 Tons of Italian Marble,* 186 F.Supp. 452, 456 (E.D.Va.1960) [*CLYTHIA* abandoned after remaining visible but unsalvaged in Virginia surf zone]; *Sindia Expedition, Inc. v. The SINDIA,* 895 F2d 116, 117 (3d Cir. 1990) [Windjammer abandoned in surf zone]; *Moyer v. ANDREA DORIA,* 836 F.Supp. 1099 (D.N.J. 1993) [location of sunken Italian liner never lost; deemed abandoned by underwriters in face of indifference to persistent and successful salvage]; *Bemis v. RMS LUSITANIA,* 884 F.Supp. 1042, 1049 (E.D. Va. 1995) [same].

The unique test of abandonment below means that identically-situated property will be found abandoned everywhere except in the Fourth Circuit. This clearly frustrates both the intent of Congress in the ASA and the

underlying rationale for U.S. admiralty jurisdiction: the uniformity of maritime law.

V. CONCLUSION

For the foregoing reasons, Virginia's and Sea Hunt's Petitions for *Certiorari* should be GRANTED.

Respectfully submitted,

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APPENDIX A

DESCRIPTION OF *AMICI CURIAE*

The Professional Shipwreck Explorers Association ("ProSEA") and the Historic Shipwreck Salvage Political Advisory Committee ("HISSPAC") are organizations comprised of companies and individuals committed to protecting the right of private companies and persons to engage in the search for and responsible excavation and recovery of historic shipwrecks. ProSEA and HISSPAC have been active in the promulgation of international conventions and federal and state laws and regulations governing historic shipwrecks and the rights of finders and salvors thereto. These organizations see the uniformity of U.S. admiralty law and its recognition and protection of salvage rights as essential to the continued vitality of the emerging industry of historic shipwreck recovery.

Mel Fisher Enterprises is the Key West, Florida successor to the renowned Treasure Salvors, Inc., the company that single-handedly searched for, located and salvaged the lost *and abandoned* 1622 Spanish galleons

ATOCHA and *SANTA MARGARITA*--discovering the richest shipwrecks ever found while winning an epic legal battle over their ownership. The *Treasure Salvors* litigation established the bedrock of modern U.S. admiralty law governing historic shipwreck salvage while demonstrating the inherent flexibility of the venerable principles of salvage law to the recovery of shipwrecks of historic and archaeological significance. Mel Fisher Enterprises wants its hard-earned precedents protected for future generations of undersea explorers.

Old World Search & Recovery, Inc. and Southland Marine, Inc. are each sub-contractors to Mel Fisher Enterprises. Working under the protection of the United States District Court for the Southern District of Florida, these companies spent the 2000 salvage season conducting successful search and salvage operations on the *SANTA MARGARITA* site in the Florida Keys

Cobb Coin Company, Inc. is a sister corporation to Salvors, Inc. For decades, its vessels and divers have been

actively and successfully salvaging the *abandoned* shipwrecks of Spain's illfated 1715 Plate Fleet off the east central coast of Florida. Like *LA GALGA* and *JUNO* herein, the 1715 Fleet was lost in what has since become the territorial waters of the State of Florida. And like the Commonwealth of Virginia permits--pursuant to which Sea Hunt, Inc. searched for, discovered and began successful salvage operations on the Spanish frigate shipwrecks *JUNO* and *LA GALGA* at issue herein--Cobb Coin Co. has long conducted its own successful salvage operations in Florida waters under the authority of search and recovery permits issued by that state.

Similarly, both *amici* Intersal, Inc. and Enterprise Marine Services, Inc. have been granted exclusive search and recovery permits by the states of North Carolina and Alabama, respectively, to search for valuable Spanish shipwrecks believed lost in the coastal waters of those states. In fact, the target of Intersal's search efforts is the 1750 sister vessel to *LA GALGA, EL SALVADOR*. Intersal and Enterprise see the Fourth Circuit's open defiance of the

Supreme Court and its unprecedented finding of non-abandonment--and the even more astonishing salvage award of *zero* percent for Sea Hunt's discovery of a shipwrecks that may well prove to be the long-lost *JUNO* and *LA GALGA*--as presenting a clear and present danger to their own substantial investments of time and money into archival research, electronic sensing, permit negotiations and diving operations.

Ironically, Quicksilver International, Inc., a Virginia Beach-based salvage company, has also been searching for the *JUNO* and believes to have found the wreck far offshore of the purported location that Spain now asserts is the site of the sunken frigate. Quicksilver's own search and recovery efforts have been ongoing for more than a decade under the protection of the United States District Court for the Eastern District of Virginia in *Quicksilver International, Inc. v. Unidentified, etc. Vessel*, C.A. No. 88-618. In spite of Quicksilver's well-publicized claim of discovery of *JUNO*, the Spanish Embassy has expressed neither interest nor any opposition whatsoever to the claim

of discovery. *See, Sea Hunt v. Unidentified Shipwrecked Vessel(s)*, 47 F.Supp.2d 678, 683-84 (E.D.Va. 1999).

Deep Sea Research, Inc. ("DSR") is the successful finder and salvor-in-possession of the California Gold Rush shipwreck, S.S. *BROTHER JONATHAN*, a vessel whose celebrated precious cargo spawned a legal battle with California decided by this Court in 1998. DSR joins in this *amicus* brief to protect the hard-earned precedent it won from an unanimous Court: a sovereign claimant to a shipwreck without possession thereof cannot prevent or otherwise interfere with its salvage. *DSR, supra.*

The Lady Elgin Foundation is a not-for-profit foundation that won title to its namesake shipwreck, one of the Great Lakes' most historic. Through a public and private cooperative venture, the Foundation is conducting the archaeological study and careful recovery of portions of the *LADY ELGIN* shipwreck for eventual display and curation in the Chicago area. It, too, is committed to protecting the admiralty law precedent which enabled it to

successfully defend its right to explore and salvage the *LADY ELGIN*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STATE OF RHODE ISLAND
Plaintiff

v. C.A. No. 99-136T

The Unidentified, Wrecked,
and Abandoned Vessels,
among which is believed to be
the Lord Sandwich which in turn,
is believed to have formerly have been
the **H.M.S. *ENDEAVOUR***, their apparel, tackle, furniture,
equipment, cargo, etc., located in Newport Harbor,
Defendants in rem

ORDER FOR FINAL JUDGMENT

This action having been commenced by the filing of a complaint within the admiralty and maritime jurisdiction of this Court and the concomitant issuance of warrant of symbolic Arrest of the Unidentified, Wrecked, and Abandoned Vessels, among which is believed to be the Lord Sandwich which, in turn, is believed to have formerly have been the H.M.S. Endeavour; and

The said wrecks having been duly taken into the Marshal's de jure constructive possession and then taken into de facto custody of a substitute guardian, the Rhode

Island Historic Preservation and Heritage Commission (an agency of the State of Rhode Island Historic Preservation and Heritage Commission (an agency of the State of Rhode Island), on April 6, 1999, and no defendants and/or potential claimants having come forward to plead, or to request an extension of time in which to do so, or in any way proceed in this action after the State of Rhode Island dutifully complied with the Supplemental Rules for Certain Admiralty and Maritime Claims Rule C(4); and

Rhode Island having received no answer within the time specified according to the Supplemental Rules for Certain Admiralty and Maritime Claims Rule C(6); and

Be is now over a year having passed since such notice has been given that there is no likelihood of any claimant to step forward and answer; and

The said Unidentified, Wrecked, and Abandoned Vessels, among which is believed to be the Lord Sandwich which, in turn, is believed to have formerly have been the H.M.S. Endeavour, their apparel, tackle, furniture, equipment cargo, etc., located in Newport Harbor having in fact been determined to be abandoned and qualifying under federal law through the Abandoned Shipwrecks Act 43 U.S.C. §§2101-2106 and through the Rhode Island Antiquities Act, R.I. General Laws §42-45, 1-4 to automatically give Rhode Island title to said wrecks, their

apparel, tackle, furniture, equipment cargo, etc. after title has passed into possession of the United States Government;

WHEREFORE BE IT HEREBY NOW THAT THIS HONORABLE COURT, does hereby

ORDER, ADJUDGE, AND DECREE Plaintiff, the State of Rhode Island, is the sole and only lawful, true, and right owner of the Unidentified, Wrecked, and Abandoned Vessels, among which is believed to be the Lord Sandwich which, in turn, is believed to have formerly have been the H.M.S. Endeavor, their apparel, tackle, furniture, equipment cargo, etc., located in Newport Harbor, and as such is entitled to an exclusive exercise of all proper and lawful rights, interests, and incidents of ownership in the said Unidentified Wrecked and Abandoned Vessels, their tackle, armament, apparel, cargo and other effects pertaining to them; and does hereby further

ORDER, ADJUDGE, AND DECREE that, save as may be expressly permitted and authorized by said plaintiff, the State of Rhode Island, which shall provide reasonable access to the public in accordance with the requirements of 43 U.S.C. §2103 (a), said defendants, and all future potential claimants of the world, shall cease and desist from entering, going upon, or in any other way exercising or attempting to exercise dominion over or control over the

said vessel the Unidentified, Wrecked, and Abandoned Vessels, among which is believed to be the Lord Sandwich which, in turn, is believed to have formerly have been the H.M.S. Endeavour, their apparel, tackle, furniture, equipment cargo, etc., located in Newport Harbor upon pain of contempt.

TO ENTER PER ORDER

12/1/00 _____
United States Dist. Judge

Presented by:

STATE OF RHODE ISLAND
By its Attorney General

SHELDON WHITEHOUSE
ATTORNEY GENERAL

Michael Rubin, Esq. #3656
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APPENDIX C

Note: this is the verbatim certified translation hereof, as appeared in the Joint Appendix filed before the Fourth Circuit Court of Appeals.

Washington, D.C.
January 11, 1965

THE AMBASSADOR OF SPAIN
WASHINGTON, DC
Number 3

Mr. D. Victor de Avenell
3345-14th Street
Vero Beach, FL 32960

Dear Sir:

Thank you for your kind letter of last December 20, which I read with extreme interest.

The legal question of the ownership of the treasure on the east coast of Florida can raise questions as to whether said state has rights to all or part of it, with or without compensation. I do not know what solution is found to this issue in the applicable law.

In any case, there is no doubt that the Spanish State may not claim any title to said treasure for the following reasons:

1) If the discovery is considered "marine salvage," the owner of the ship and/or merchandise would have lost all rights because he abandoned any attempt of recovery.

2) If the discovery is considered a discovery of a treasure in the territory (including the territorial waters) under the jurisdiction of a state, in this case the state of Florida, the laws of this state will determine title to the treasure.

In most cases extinctive prescription would act against any right possibly reclaimed by a previous owner.

Thank you again for your interest, and I remain.

Sincerely,

[signature]
Marquis de Morry del Val,
AMBASSADOR OF SPAIN

Supreme Court, U.S.
FILED
JAN 11 2001
OFFICE OF THE CLERK

Nos. 00-629 & 00-652

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA

v.

KINGDOM OF SPAIN

SEA HUNT, INCORPORATED

v.

KINGDOM OF SPAIN

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE KINGDOM OF SPAIN IN OPPOSITION TO CERTIORARI

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January 2001

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BRIEF OF THE KINGDOM OF SPAIN IN OPPOSITION TO CERTIORARI

The decision of the court of appeals rests on multiple, independent and settled principles of domestic and international law governing sovereign vessels and military gravesites. The court of appeals correctly applied these principles to affirm the Kingdom of Spain's ownership of its Royal Navy Frigates *La Galga* and *Juno* and its right to protect from commercial exploitation the final resting place of more than 425 Spanish soldiers, sailors and their dependents who died at sea in the service of their country.

To create the appearance of a conflict among the courts of appeals, Petitioner Commonwealth of Virginia ("Virginia") conflates cases applying a principle of implied abandonment where the owner of a vessel did *not* appear to protect its interests with cases in which the owner *did* appear – as the Kingdom of Spain did in this case – and proof of express abandonment was required. Virginia's Petition also ignores controlling treaties, case law and principles of international policy on which the court of appeals grounded its decision.

The court of appeals correctly held that the Royal Navy Frigates *La Galga* and *Juno* are the property of the Kingdom of Spain under at least five parallel lines of legal authority: the 1902 Treaty of Peace and General Relations Between Spain and the United States; the deference United States courts accord to understandings between other nations concerning the meaning and effect of treaties between those nations; the deference United States courts accord to military and foreign policy decisions of the Executive Branch; international law and custom concerning sovereign vessels and military gravesites; and the proper application of the Abandoned Shipwreck Act where a sovereign owner contests claimed abandonment of its vessels. No conflict among the

courts of appeals is presented by the court of appeals' application of these principles.

Petitioner Sea Hunt, Incorporated ("Sea Hunt") misreads *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), as somehow precluding a sovereign from appearing in an *in rem* proceeding to defend its ownership of a sovereign vessel. In this case, the Kingdom of Spain appeared before a U.S. court and submitted proof of ownership that was found to be dispositive. Accordingly, *Deep Sea Research* has no bearing on this case. Sea Hunt also misconstrues the admiralty law of salvage. In accordance with long-settled principles, the court of appeals correctly held that Spain was entitled to protect its vessels from commercial exploitation.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 221 F.3d 634.[1] Opinions of the district court are reported at 47 F. Supp. 2d 678 (Pet. App. 28-59) and 22 F. Supp. 2d 521. The district court's decision denying Sea Hunt's request for a salvage award is unreported. *See* App., *infra*, 1a-9a.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2000. Pet. App. 2. The petitions for a writ of certiorari were filed on October 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

[1] References to "Pet. App." are to the appendix to the Commonwealth of Virginia's Petition, No. 00-629.

COUNTERSTATEMENT OF THE CASE

1. The Royal Navy Frigates *La Galga* and *Juno* are commissioned warships of Respondent the Kingdom of Spain. The frigates sank in 1750 and 1802, respectively. At the time of their sinkings, each vessel was engaged in military service. Each vessel remains to this day on the rolls of the Navy of Spain. Under Spanish law, each vessel is public dominion property of the Kingdom of Spain. (C.A. App. 235, 229-30, 238-39).

a. *La Galga* was a fifty-gun frigate commissioned into the Spanish Navy in 1732. On her final voyage, *La Galga* was serving as escort to a convoy of merchant ships bound from Havana to Spain, providing protection from pirates. On board *La Galga* were the Second Company of the Sixth Battalion of Spanish Marines, royal property and military prisoners. On August 18, 1750, the convoy encountered a hurricane that scattered the ships and drove them westward towards Colonial America. Over the next week, *La Galga* lost her masts and rudder. On August 26, 1750, *La Galga* struck a shoal off Assateague Island, near the border between Virginia and Maryland, and sank. (C.A. App. 218-19; 423-24).

Most of those on board *La Galga* reached land and the wreck remained accessible for a month or more. From late August into October 1750, Captain Daniel Huoni unsuccessfully sought the assistance of the Virginia authorities to protect the wreck and to prevent looting. On November 3, 1750, Governor Ogle of Maryland pledged to send sheriffs to stop the looting, but a second storm scattered the wreck and ended all salvage efforts. The remains of *La Galga* were driven by storms and wave action into the seabed and became unrecoverable by then-existing salvage technology. (C.A. App. 147-53; 424-25; 429).

b. *Juno* was a thirty-four gun frigate built for the Royal Navy of Spain in 1789, at the outbreak of the Napoleonic Wars. *Juno* was assigned to Spain's Caribbean Fleet and spent the remainder of her military service on convoy escort duty. *Juno*'s final voyage began as escort to a convoy from Vera Cruz to Cadiz, but she suffered storm damage en route and put in to Puerto Rico for repairs, while the other ships continued on to Spain. After repairs were completed, *Juno* was assigned in October 1802 to serve as a troopship taking the soldiers of the Third Battalion of the Regiment of Africa and their families home to Spain from combat duty. East of Norfolk, Virginia, *Juno* encountered a fierce storm and disappeared at sea with more than 425 soldiers, sailors and military dependents on board. Over the next year, Spain's Consul General in Boston unsuccessfully canvassed United States ports for any reports of *Juno* survivors or sightings of wreckage. (C.A. App. 216-17).

2. Petitioner Sea Hunt is a commercial salvage firm that secured a permit from Virginia to take artifacts from *Juno* and *La Galga*, in return for granting Virginia a share of the proceeds. Through historical research, Sea Hunt was aware that both ships were Spanish Royal Navy vessels believed to have sunk in the vicinity of Assateague Island, Virginia. (C.A. App. 417-22; 423-30). On learning of Sea Hunt's proposed activities, the Kingdom of Spain advised that it objected to disturbance of *La Galga* and *Juno* and expressed its desire that their remains be left undisturbed as military gravesites. (C.A. App. 103, 104). Sea Hunt initiated this *in rem* action because it anticipated that Spain would claim ownership of *La Galga* and *Juno* and object to salvage. (C.A. App. 66, 73, 80, 82).

In March 1998, Sea Hunt initiated an *in rem* admiralty action seeking a declaratory judgment that *Juno* and *La Galga* had been abandoned and ceased to be sovereign vessels of Spain, and that they had become the property of Virginia or Sea Hunt under the Abandoned

Shipwreck Act or the law of finds. Pet. App. 33. In the alternative, Sea Hunt sought a salvage award giving it exclusive rights as salvor-in-possession to the vessels and their contents.

After filing its *in rem* claim, Sea Hunt conducted limited salvage operations. At a September 15, 1998 hearing concerning those operations, unrebutted expert testimony was presented by a National Park Service underwater archaeologist that Sea Hunt was using inappropriate and potentially destructive techniques to scour the seabed for artifacts that were endangering the remains of the vessels. (C.A. App. 181-97). At the request of the district court, Sea Hunt agreed to cease operations until ownership of *Juno* and *La Galga* had been adjudicated.

3. In response to the Sea Hunt and Virginia claims, Spain appeared in the district court and filed a verified claim that it is the owner of *Juno* and *La Galga*. In support of a motion for summary judgment and in opposition to a Sea Hunt and Virginia cross-motion, Spain provided the district court with documentary history of the vessels demonstrating that both had been commissioned naval vessels on active duty and had never been abandoned or stricken from the rolls of the Spanish Navy. Spain also demonstrated that under Spanish law *Juno* and *La Galga* are public dominion property of Spain that can only be ceded or abandoned by an express act authorized by Parliament. Spain also objected to commercial exploitation of the gravesites of its personnel. (C.A. App. 104; 105-26; 198-204; 214-34; 235, 238).

4. Central to this case and to the decision of the court of appeals are two treaties entered into by the Kingdom of Spain. Article X of the 1902 Treaty of Friendship and General Relations (33 Stat. 2105, 2110-11, 11 Bevans 628, 632) obligates each nation "in cases of shipwreck" to provide the vessels of the other nation with "the same assistance and

protection and the same immunities which would have been granted to its own vessels in similar cases." The understanding of the United States and Spain, affirmed by the court of appeals, is that this article obligates the United States to provide a Spanish sovereign vessel shipwrecked in United States waters with the same rights and immunities that the United States provides to its own sovereign vessels.

The earlier treaty is the 1763 Definitive Treaty of Peace, 42 Consol. T.S. 279 (Feb. 10, 1763) (C.A. App. 521-34) by which Spain, Great Britain, France and Portugal ended the Seven Years' War. To resolve the conflict between Spain and Great Britain, Great Britain agreed to withdraw its forces from Cuba (Article XIX) in exchange for the cession by Spain of claims to territory east of the Mississippi River "on the continent of North America." (Article XX). The 1763 Treaty expressly preserved Spain's ownership of moveable Royal Property in North America, providing that "[H]is Catholick Majesty shall have the power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things." (Article XX). In the district court, Diplomatic Notes of Great Britain and Spain documented each nation's common understanding that the Treaty was not a cession of *La Galga* from Spain to Great Britain. App., *infra*, 27a, 29a.

5. In support of Spain's ownership rights in *Juno* and *La Galga* and its right to refuse salvage, the United States submitted Statements of Interest on behalf of the Departments of State and Defense. The Department of Defense statement declares the policy of the United States that more than 16,000 sunken U.S. military vessels and aircraft sunk around the world, including uncounted military gravesites, remain United States property absent an authorized express declaration of abandonment. App., *infra*, 21a-22a. It also articulates the United States' policy to secure protection for its sunken sovereign vessels and aircraft from unauthorized disturbance by providing reciprocal

treatment to other nations: "The Department of Defense has a strong interest in ensuring that the *Juno* and *La Galga* are treated in the same way that we would want U.S. Navy, U.S. Army, U.S. Air Force and other submerged sovereign non-commercial United States wrecks in foreign waters to be treated." App., *infra*, 24a.

The Declaration of Interest of the Department of State states that Article X of the 1902 Treaty of Friendship and General Relations is "unique" among the many United States treaties of friendship, commerce and navigation with other nations and, in the view of the Department of State, "imposes on the United States the responsibility to afford to these . . . vessels [*La Galga* and *Juno*] the same assistance and protection and the same immunities which would be granted to sunken United States warships in the same location." App., *infra*, 13a, 14a.

6. The district court upheld Spain's ownership of *Juno* and its right to reject salvage, but ruled that *La Galga* had been expressly abandoned by Spain under the district court's interpretation of the 1763 Definitive Treaty of Peace. Accordingly, the district court ruled that *La Galga* had become the property of Virginia under the Abandoned Shipwreck Act. Pet. App. 50-53.

7. The court of appeals affirmed the district court's rulings upholding Spain's ownership of *Juno* and denying Sea Hunt salvage rights. The court of appeals reversed the district court's ruling that the 1763 Treaty abandoned *La Galga*. The court of appeals held that Petitioners had been required to show express abandonment under long-settled admiralty law principles reflected in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), Pet. App. 11, and under the Abandoned Shipwreck Act's definition of "abandoned shipwrecks" as those "to which the owner has relinquished ownership rights *with no retention*." (43 U.S.C. § 2101(b))

(emphasis added). The court of appeals further held that, while an implied abandonment standard may be applied to privately owned vessels, an express abandonment standard is required "where, as here, a nation has stepped forward to assert ownership over its sovereign shipwrecks." Pet. App. 10-11. Express abandonment is also required under Article X of the 1902 Treaty, which confers on Spanish vessels "the same immunities" conferred upon similarly situated vessels of the United States. The immunities extended to Spain's vessels by the 1902 Treaty include the preclusion of implied abandonment of United States property under the Property Clause of the Constitution (U.S. Const. art. IV § 3). Additionally, the court of appeals held that application of an express abandonment standard to *La Galga* and *Juno* is required by the legitimate interests of the executive branch in respecting "the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment." Pet. App. 16 (quoting Statement of Interest, U.S. Dept. of State ¶ 15 (App., *infra*, 14a)).

Applying these principles, the court of appeals ruled that no express abandonment of *La Galga* had been shown. As to the Treaty of 1763, the court agreed with Spain and Great Britain that the cession in the Treaty of territory "on the continent of North America" "was not intended to include movable property located in coastal waters," an understanding which is consistent with this Court's rulings in the Submerged Lands cases that 18th Century North America territory did not include coastal waters. Pet. App. 24. Moreover, the court recognized that the closing proviso of Article XX of the Treaty includes an express reservation of Spain's rights to its movable property in North America. Pet. App. 22.

Finally, the court of appeals observed that, if implied abandonment were the applicable standard, "even a finding of implied abandonment would be improper" in this case. Pet. App. 25.

REASONS FOR DENYING THE WRIT

1. This Case Is Not An Appropriate Vehicle For Determining The Meaning Of "Abandonment" Under Admiralty Law.

Virginia urges the Court to grant review in this case to determine the meaning of "abandonment" under the Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298 (1988) (codified at 43 U.S.C. § 2101-2106 (1994)), and general admiralty law. *See* Pet. 8-25. In particular, Virginia urges the Court to grant review in order to decide whether abandonment may be implied from inaction over a period of time, or instead requires an express act by the owner of the sunken vessel. Pet. 10-15.

There are multiple reasons why this case is not an appropriate vehicle for deciding that issue. *First*, this case involves sunken warships of a sovereign nation, which may be abandoned only by express act of the sovereign even if privately-owned shipwrecks are subject to an implied abandonment standard. *Second*, the 1902 Treaty between the United States and Spain requires the application of an express abandonment standard in this case. And *third*, the choice of a legal standard does not ultimately matter in this case, because the vessels at issue were not abandoned even under an implied abandonment standard.

a. This Case Involves Sovereign Vessels.

The *Juno* and *La Galga* were frigates in the Spanish Navy. Indeed, both ships remain on the Spanish Naval Registry to this day. Even if sunken private vessels may be subject to a standard of implied abandonment, there are strong arguments that vessels owned by a sovereign nation – and, especially, warships of a sovereign nation – should

remain property of the sovereign absent an express act of abandonment.[2]

The United States Government takes the position that warships of a sovereign nation remain the property of the sovereign absent an express act of abandonment. The United States, in addition to appearing as an *amicus curiae* in support of Spain, has submitted formal statements of the foreign and military policy of the United States. App., *infra*, 10a, 20a. The Statement by the Department of Defense, signed by the Judge Advocate General of the Navy, sets forth the interest of the United States in honoring the principle that a nation's sunken naval vessels are sovereign property that may not be disturbed without express authorization from the sovereign. App., *infra*, 23a. The declaration observes that more than 1,500 sunken U.S. naval vessels and countless sunken aircraft are located around the world, and that it is important that "the United States and its constituent States [grant] reciprocal recognition of the sovereign title and ownership interests of other sovereign governments in their wrecks in United States waters." *Id.* The State Department submission, signed by the Deputy Assistant Secretary of State for Oceans, Fisheries and Space, declares that it is "the policy of the United States Department of State to recognize claims by foreign governments . . . to ownership of foreign

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[2] The legislative history of the Abandoned Shipwreck Act indicates that sovereign vessels are treated differently from other vessels. *See* Pet. App. 10 (quoting H.R. Rep. No. 100-514(II), at 13 (1988)) ("[T]he U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment. . . . The same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State."). *See also* Brief of the United States, at 35 & n.25, *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (No. 96-1400).

warships sunk in waters of the United States." App., *infra*, 12a. The statement further declares that "[i]t is in the foreign policy interest of the United States to honor the request of the Government of Spain" in this case that its sunken warships not be disturbed. *Id.* at 14a. Because this case involves a special kind of shipwreck – warships of a sovereign nation – there is no occasion for the Court to consider whether shipwrecks of all kinds are subject to a rule of implied abandonment.

b. An Express Abandonment Standard Is Required Under The 1902 Treaty Between the United States and Spain.

The court of appeals held that "express abandonment . . . is required [under the terms] of the 1902 Treaty of Friendship and General Relations between the United States and Spain." Pet. App. 13. The 1902 Treaty provides that "[i]n cases of shipwreck, . . . each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases." 33 Stat. 2105, 2110-11, 11 Bevans 628, 632. The U.S. Department of State informed the courts below "'that this provision is unique' in that no other 'friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded provision applying to State ships.'" Pet. App. 13-14 (quoting U.S. Department of State, Statement of Interest ¶ 13 (App., *infra*, 13a)).

Both the United States and Spain agree that the Treaty provides that Spanish ships sunk in U.S. territorial waters are accorded the same immunity as U.S. ships sunk in U.S. waters. As the court of appeals noted, U.S. vessels "may only be abandoned by an express, unambiguous, and affirmative act." Pet. App. 14 (citing U.S. Const. art. IV § 3; *United States v. California*, 332 U.S. 19, 39-40 (1947); *United States v. Steinmetz*, 973 F.2d 212, 222 (3d Cir. 1992)). The court of appeals appropriately concluded: "We

cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities." Pet. App. 15.

The court of appeals' interpretation of the 1902 Treaty is plainly correct. In any event, the lower court's resolution of this narrow issue, on which there is no circuit conflict, warrants no further review.

c. Spain Would Retain Ownership Of The Vessels At Issue In This Case Even Under An Implied Abandonment Standard.

The court of appeals concluded that "even a finding of implied abandonment would be improper" in the circumstances of this case. Pet. App. 25. As the court of appeals noted, the Kingdom of Spain strove to protect *La Galga* after she sank, maintained the ship on its Naval Registry, and "vigorously asserted" a claim of ownership when Sea Hunt commenced its *in rem* admiralty action. *Id.* The court of appeals also noted that the technology needed to find and recover the wreck only recently became available. *Id.*

The court of appeals' resolution of this fact-bound issue is correct and warrants no further review. Because the result in this case ultimately does not depend on whether the court applies a standard of express abandonment or implied abandonment, there is no reason for this Court to address that issue in this case.

* * *

In sum, before reaching the question whether sunken vessels may be abandoned by implication, the Court would have to (1) overturn the court of appeals' fact-bound determination that there has been no abandonment of the

vessels at issue in this case under an implied abandonment standard; (2) overturn the court of appeals' interpretation of the 1902 Treaty between the United States and Spain (a narrow issue on which the parties to the treaty are in agreement) and (3) consider whether warships of a sovereign nation are subject to an express abandonment standard even if privately-owned shipwrecks are subject to a less-demanding implied abandonment standard. Not one of these issues merits review. And there is no reason to think that this Court would disagree with the court of appeals' well-reasoned resolution of any of these issues, let alone all of them.

2. The Court of Appeals' Decision Does Not Create A Circuit Conflict.

Virginia asserts (Pet. 10-15) that the courts of appeals are in conflict over the question whether abandonment of shipwrecks may be implied rather than express. The court of appeals' decision in this case does not conflict with any decision of another court of appeals. Moreover, any disagreement among the circuits is less sharply defined, and less significant, than is suggested by Virginia's Petition.

As the court of appeals explained, the Fourth Circuit has not ruled out implied abandonment of a shipwreck in all circumstances. The Fourth Circuit has held that "a court *may* infer an abandonment" when the property is "an ancient and long-lost shipwreck." *Columbus-America*, 974 F.2d at 464-65 (emphasis added). The Fourth Circuit has declined to draw an inference of abandonment, however, when the owner appears in the *in rem* action and asserts a claim of ownership. *Id.* In reaching this conclusion, the Fourth Circuit has relied on the established rule that when an owner asserts a claim to property that was involuntarily taken from his control, "the law is hesitant to find an abandonment." Pet. App. 12 (quoting *Columbus-America*, 974 F.2d at 467-68).

As the Fourth Circuit observed, no other court of appeals has employed an implied abandonment standard against an owner that has appeared in an *in rem* action and asserted a claim to its property. Pet. App. 12. For that reason, the decision in this case does not conflict with any decision of any other court of appeals.[3]

In addition, as noted above, this case involves warships of a sovereign nation rather than privately-owned vessels. Because sovereign vessels are subject to an express abandonment standard even if privately-owned vessels may be subject to an implied abandonment standard, decisions holding that private vessels have been impliedly abandoned do not conflict with decisions, such as this one, applying an express abandonment standard to a sovereign warship.

Even as to privately-owned vessels, the Fourth Circuit's decision in *Columbus-America* does not represent a sharp departure from prior admiralty law or the decisions of other circuits. The Sixth Circuit has observed that "the apparent divergence of authority" between its decisions and those of the Fourth Circuit "masks a degree of underlying agreement." *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem*, 177 F.3d 491, 499 (6th Cir. 1999). The Sixth Circuit's standard, like the Fourth Circuit's, "reveals a uniform concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will"

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[3] Petitioners and their amici repeatedly cite decisions in which the owner of the vessel did not come forward to contest the claim of abandonment. *See* Sea Hunt Pet. 16-17; Virginia Pet. 17; Professional Shipwreck Explorers Ass'n Amici at 13-14. In those cases, the courts may infer abandonment from the owner's failure to appear and therefore need not address whether express abandonment has been shown. These decisions have no bearing on whether express or implied abandonment is appropriate when, as here, the owner has appeared.

and requires parties alleging abandonment to meet "the exacting burden of proof admiralty law imposes on those who allege abandonment." *Id.* at 499-500. Similarly, the First, Fifth, and Ninth Circuits have inferred abandonment only in cases in which the original owner failed to appear and assert a claim of ownership. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) ("no person or firm appeared to assert any overall claim of ownership"); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981) (original owner does not lose title "except in extraordinary cases"); *see also Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189, 1194 (9th Cir.) (upholding original owner's claim to cargo), *cert. denied*, 121 S. Ct. 62 (2000) (No. 99-1958).[4]

In sum, this case differs from other decisions of courts of appeals in that the Kingdom of Spain, a sovereign nation, appeared in the admiralty court and asserted a claim to its sovereign vessels. No court of appeals' decision has applied a standard of implied abandonment in similar circumstances, and therefore the Fourth Circuit's decision in this case does not create a circuit conflict.

3. The Additional Issues Raised in Sea Hunt's Petition Merit No Further Review.

Sea Hunt raises two additional issues that plainly do not warrant this Court's attention. *First*, Sea Hunt asserts

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[4] The petition for a writ of certiorari in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 203 F.3d 291 (4th Cir. 2000), urged the Court to grant review to resolve an asserted circuit conflict over whether abandonment may be implied as well as express. This Court recently denied the petition. 121 S. Ct. 277 (2000) (No. 99-1935).

(Sea Hunt Pet. 9) that "the Fourth Circuit is providing Spain a sovereign immunity and/or exemption from a direct proceeding *In Rem* against all vessels originally owned by Spain," contrary to this Court's decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). Sea Hunt simply misreads this Court's decision in *Deep Sea Research*. That decision holds that a State's immunity from suit under the Eleventh Amendment does not extend to an *in rem* proceeding, at least if the *res* is not in the actual possession of the State. Assuming that the holding in *Deep Sea Research* applies with full force to a sovereign nation, the court of appeals' decision in this case is entirely consistent with *Deep Sea Research*. Spain did not contend that the district court lacked authority to determine ownership of the shipwrecks. Instead, Spain appeared before the court and submitted a claim to the *res*. The courts below considered Spain's proofs of ownership, evaluated Petitioners' counter-evidence, and ruled in favor of Spain on the merits. That is a very different matter from holding that the sovereign immunity of the Kingdom of Spain extends to *in rem* proceedings, or that Spain is "exempt" from *in rem* proceedings in admiralty. Sea Hunt's effort to manufacture a conflict with this Court's decision in *Deep Sea Research* is baseless.

Second, Sea Hunt's petition includes a lengthy and confused discussion of the law of salvage. *See* Sea Hunt Pet. 19-25. The court of appeals rejected Sea Hunt's claim to a salvage award in a footnote at the end of its opinion. Pet. App. 27 n.2. The court of appeals agreed with the district court that "[i]t is the right of the owner of any vessel to refuse unwanted salvage," and that "Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership interests and refusal to agree to

salvage activity." *Id.*[5] The lower court's resolution of Sea Hunt's salvage claim is fact-bound, does not conflict with any decision of another court of appeals, and reflects the long-settled doctrine that the owner of a vessel, including a long-sunken vessel, has the right to reject a salvor's services. *See, e.g., Lathrop v. Unidentified Wrecked and Abandoned Vessel*, 817 F. Supp. 953, 964 (M.D. Fla. 1993); *Bonifay v. The Steamship Paraporti*, 145 F. Supp. 879, 882 (E.D. Va. 1956); *The Pohatcong*, 77 F. 996, 997 (S.D.N.Y. 1896); *New Harbor Protection Co. v. Steamer Charles P. Chouteau*, 5 F. 463, 464 (D. La. 1881); *The Yucatan*, 30 F. Cas. 893, 895-96 (S.D. Fla. 1847); *cf. Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985). No further review is warranted.

4. The Foreign Policy Implications Of This Case Counsel Against Further Judicial Proceedings.

"Our Constitution charges the political branches with the conduct of foreign affairs." Pet. App. 16 (citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109-10 (1948)). This case involves relations between the United States and the Kingdom of Spain, the interpretation of a treaty signed by both sovereigns, the shared understanding of Spain and Great Britain as to the terms of their 1763 Peace Treaty, and principles of international comity. The court of appeals recognized that "[t]he United States 'is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration,

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[5] Amici Professional Shipwreck Explorers Ass'n *et al.* argue that a "non-possessing sovereign" cannot refuse salvage (Br. 5-6). The lower courts, however, correctly rejected this distinction as unsupported by precedent. *See* Pet. App. 27 n.2; App., *infra*, 3a.

or exploitation, by private parties seeking treasures of the sea.'" Pet. App. 25-26 (quoting Brief of the United States as Amicus Curiae, at 1). As the court of appeals recognized, "matters as sensitive as these implicate important interests of the executive branch." Pet. App. 26.

The court of appeals noted that "[t]he express abandonment standard is regularly applied by the executive branch in dealing with foreign vessels," and concluded that "[i]t is simply not for [the courts] to impose a looser standard that would interfere with this long standing political judgment in sensitive matters of international law." Pet. App. 16. *See also Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (It is "not for the courts to deny an immunity which our government has seen fit to allow."). In interpreting the relevant treaty provisions, moreover, the Fourth Circuit followed the principle that "'[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.'" Pet. App. 15 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). The Fourth Circuit concluded its opinion by reiterating that appropriate deference to the executive branch prevents a court from "just turn[ing] over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner." Pet. App. 26.

The same considerations of deference to the executive branch weigh against further judicial proceedings in this case. As the court of appeals recognized, the Kingdom of Spain "vigorously asserted its ownership rights in this proceeding," and "[n]othing in the law of admiralty suggests

that Spain has abandoned its dead by respecting their final resting place at sea." *Id.*[6]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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January 2001

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[6] The United States filed briefs as *amicus curiae* in support of the Kingdom of Spain in both the district court and the court of appeals. The Kingdom of Spain recognizes that the usual practice of the United States is not to file an amicus brief at the petition stage without an invitation from the Court. In view of the foreign policy and military implications of this case, the Kingdom of Spain respectfully requests that if the Court were inclined to grant the petitions, it invite the Solicitor General to file a brief expressing the views of the United States before granting review.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

SEA HUNT, INC.,

Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, etc. *in rem, et al.*,

Defendants.

Case No. 2:98cv281

June 25, 1999

OPINION AND ORDER

Before CLARKE, District Judge.

This case is currently before the Court on the issue of Plaintiff Sea Hunt, Inc.'s ("Sea Hunt") entitlement to a salvage award for locating and salvaging articles from the JUNO, a Spanish frigate which sank off the coast of Virginia in 1802.

By Order of April 27, 1999, this Court held that the Kingdom of Spain ("Spain") had never abandoned the wreck of the JUNO and retained ownership of the remains of the vessel. *See Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 1999 WL 257748

(E.D. Va. 1999).[1] By the same Order, this Court directed the parties to the case to submit briefs on the issue of whether Sea Hunt should receive a salvage award for services conducted on JUNO even though Spain retained ownership of the wreck. Pursuant to this Court's Order of June 7, 1999, the Court allowed the parties to file reply briefs on the same issue. All briefs having now been received and considered, the Court FINDS that because Spain communicated to Sea Hunt its desire that the wreck of JUNO should not be disturbed, Sea Hunt is not entitled to any award for services performed in contradiction to Spain's wishes.[2]

Although the "law of salvage presumes that the owner desires the salvage service," *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 961 (4th Cir. 1999), "potential salvors do not have an inherent right to save distressed vessels." *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 964 (M.D. Fla. 1993). A salvage award "may be denied if the salvor forces its services on a vessel despite the rejection of them by a person with authority over the vessel." *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 (5th Cir. 1983). The doctrine of rejection of salvage is an ancient one, and has been recognized by many courts. *See, e.g.*, *The YUCATAN*, 30 F. Cas. 893 (S.D. Fla. 1847); *The CHOTEAU*, 4 Woods 71, 9 F. 211 (C.C.E.D. La. 1881); *The POHATCONG* , 77 F. 996 (S.D.N.Y. 1896); *The INDIAN*, 159 F. 20 (C.C.A.5 1908); *Legnos v. M/V OLGA*

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[1] This Court also held that LA GALGA, a Spanish frigate which sank in 1750, had been explicitly abandoned by Spain.

[2] The parties raised a number of issues in their briefs, including whether Spain is entitled to sovereign immunity, and whether the wreck of JUNO should receive special treatment as a war grave. However, as the Court previously declined to address the nature of JUNO as a military vessel, and because common law principles are sufficient for decision on this matter, these issues will not be discussed.

JACOB, 498 F.2d 666 (5th Cir. 1974); *Consolidated Towing Co. v. Hannah*, 509 F. Supp. 1031 (W.D. Mo. 1981). This doctrine has also been previously recognized by this Court. *See Bonifay v. The PARAPORTI*, 145 F. Supp. 879 (E.D. Va. 1956) (parties attempting to salvage vessel contrary to owner's instructions were "gratuitous intermeddlers" and were entitled to no award). While a party may salvage a vessel without the express permission of the vessel's master or owner, *Merritt & Chapman Derrick & Wrecking Co. v. United States*, 274 U.S. 611, 613, 71 L. Ed. 1232, 47 S. Ct. 663 (1927) (absent express consent, salvage award may be granted when "under the circumstances, any prudent man would have accepted" the services), an unequivocal rejection of salvage services will normally be respected. *New Harbor Protection Co. v. The CHARLES P. CHOUTEAU*, 5 F. 463, 464 (D. La. 1881) ("If the master of a burning vessel prefers to allow her to burn rather than to permit outside parties to extinguish the flames, he may do so.").

Sea Hunt has argued in its briefs that a rejection of salvage services may only be accomplished when the owner or master is in actual possession of the vessel and in a position to rescue the property. While it is true that in most cases of rejection of salvage, the owner or master is in possession of the vessel, the Court finds that possession of the vessel in these cases is merely a circumstance of the rejection, and not a requirement. The Court has found no statement of law which requires that the master of a vessel be present to effectuate a rejection of salvage. In fact, the right to reject salvage has been recognized in cases involving long-lost shipwrecked vessels. *See Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985) (salvage award denied where the owner of the vessel "may not even have desired for the property to be rescued."); *see also Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 (5th Cir. 1983); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817

F. Supp. 953, 964 (M.D. Fla. 1993); *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1389 (S.D. Fla. 1988).

In *Platoro* and *Lathrop*, the courts adopted the idea of "constructive rejection" of salvage. Constructive rejection "bars an award if the rejection was reasonably understood by a salvor." *Lathrop*, 817 F. Supp. at 964. In *Lathrop*, the wrecked vessel subject to salvage was located in submerged land belonging to the State of Florida and dedicated to the United States for use as a national park. The *Lathrop* court determined that the salvor was not entitled to an award because, based on the wreck's location within a national park, the salvor "should have known that the State of Florida, the presumed owner of the submerged lands and any property embedded in the soil, might refuse [the salvor's] offer to excavate the alleged vessel." *Id.* at 965.

In *Platoro*, however, a salvage award was granted despite a claim of constructive rejection. Although the *Platoro* court recognized the doctrine of constructive rejection, it found that in the case of a shipwrecked vessel in the submerged lands of the State of Texas, it was not reasonable for the salvors to conclude either that Texas was the owner of the vessel, or that applicable Texas statutes stated an intent to reject salvage services. *Platoro*, 695 F.2d at 902.

In this case, Sea Hunt knew from the outset of this action that JUNO was a Spanish vessel, *see Verified Complaint in Admiralty in Rem*, March, 11, 1998, at ¶ 29, and possibly of a military character. During the March 11, 1998, hearing before this Court, Sea Hunt expressed to the Court its concern that Spain might claim ownership and reject Sea Hunt's efforts at salvage:

> . . . in the event that the wreck is determined to not have been abandoned, we would like to have our salvage rights protected as of today given the fact that potentially a sovereign

> owner could claim that they are refusing salvage.

See Transcript of Proceedings, March 11, 1998, at 18, lines 14-17 (statement of Mr. Hess). As early as September 24, 1997, more than five months before the filing of the current *in rem* action, Sea Hunt was informed during negotiations with the National Park Service[3] that Spain might claim ownership of the wreck. *See Transcript of Proceedings*, September 15, 1998, at 186, lines 17-21 (testimony of Mr. Benson); *Supplemental Brief for the United States as Amicus Curiae*, attachment 2, May 27, 1999. Sea Hunt's knowledge of the origin of the wreck and of the potential claims of Spain lead this Court to believe that Sea Hunt should have known, and in fact did know, before the filing of this *in rem* action that Spain might refuse any salvage efforts made against JUNO.

In addition, Sea Hunt received express notice from Spain of Spain's intent to refuse salvage of JUNO. Sea Hunt filed a Verified Complaint in Admiralty with this Court on March 11, 1998. In that complaint, Sea Hunt represented to the Court that, "upon information and belief, one of the Defendant Shipwrecked Vessel(s) is that of the JUNO, a Spanish frigate that disappeared in the vicinity of the salvage sites in 1802." *Verified Complaint in Admiralty in Rem*, March, 11, 1998, at ¶ 29. On March 12, 1998, this Court entered an Order which recognized that Spain might have an interest in making a claim to the wreck of JUNO, and directed Sea Hunt to serve Spain with notice of the *in rem* action against the wreck. On May 18, 1998, this Court

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[3] Because the wreck of the JUNO was located in close proximity to the Assateague Island National Seashore, Sea Hunt entered into negotiations with the National Park Service to discuss salvage operations within the National Seashore's boundaries.

received Spain's answer to the Verified Complaint and Spain's claim of ownership of the wreck.[4] Attached to the claim of ownership was a copy of a Verbal Note from the Spanish embassy in Washington, D.C. to the United States Department of State, in which Spain stated its wish "that the remains of these vessels be treated as maritime graves and that their salvage not be authorized at this time." *Verbal Note*, May 8, 1998, attachment to *Claim of Spain as Owner of Shipwrecks and Contents*, May 18, 1998 (translation). Furthermore, on March 12, 1998, a letter was mailed from the National Park Service to Sea Hunt's president, which notified Sea Hunt that:

> Pursuant to your request, NPS [the National Park Service] contacted the Government of Spain and met with members of the Embassy on November 13, 1997. On February 26, 1998, NPS received a written response from the Government of Spain. The response states that the shipwrecks are sovereign vessels, property of the Government of Spain, and may not be salvaged or disturbed without authorization.

Supplemental Brief for the United States as Amicus Curiae, attachment 2, May 27, 1999.[5] Thus, no later than March 12,

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[4] For various reasons which need not be discussed here, this answer was later found by the Court to be defective. *See Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 22 F. Supp. 2d 521 (E.D. Va. 1998). For the purposes of this Order, however, it is only necessary to point out that the Verbal Note from Spain was received by Sea Hunt as of the date of the first defective answer.

[5] Sea Hunt has previously disputed that Spain was contacted by the NPS at Sea Hunt's request. Regardless, as a result of the NPS' contact with Spain, Sea Hunt was explicitly made aware of Spain's refusal of salvage.

1998, Sea Hunt had received an express communication of refusal of salvage services from Spain.

Sea Hunt argues that in this case, where the wreck of JUNO is not in a single location but rather scattered about the ocean floor among several other shipwrecks, it is impossible to determine if a particular artifact belongs to JUNO without first salvaging the artifact. In this regard, Sea Hunt refers the Court to the Ninth Circuit's decision in *Tidewater Salvage, Inc. v. Weyerhaeuser Co.*, 633 F.2d 1304 (9th Cir. 1980). In *Tidewater*, a dispute arose when several floating logs belonging to Weyerhaeuser were salvaged by Tidewater, a professional salvor, despite Weyerhaeuser's express communication that it did not want Tidewater to salvage its logs. On an issue of first impression for the Ninth Circuit, the court stated the following rule:

> An owner, acting as a prudent person, may refuse salvage assistance by completed communication to the prospective salvor at any time before the act of salvage. A refusal of assistance . . . is not completed, however, until the salvor, acting as a reasonable person, has determined, or could determine, the ownership of the object of salvage.

Id. at 1307. Not wishing to "discourage salvage as to all floating logs," the court found that:

> As applied to this case, there was no completed communication as to any one floating log until Tidewater, after taking the log aboard, discerned the Weyerhaeuser ownership.

Id. Therefore, since Tidewater had already completed salvage before the communication of refusal was completed, the court affirmed the grant of a salvage award for the floating logs. *Id.*

This Court is not persuaded by *Tidewater*'s reasoning. In *Tidewater*, the court was dealing with floating logs, and not with an inert sunken ship. The plaintiff and defendant in *Tidewater* had to act very promptly, whereas in the case at bar, Sea Hunt had time to contact Spain to determine Spain's wishes before beginning salvage. While the Court recognizes the difficulty of determining the origin of a particular artifact without first bringing it out of the water to examine it, a holding in this case similar to the Ninth Circuit's in *Tidewater* would in effect negate the right to refuse salvage, and would work to "subordinate the rights of the owner to those of the salvor." *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1389 (S.D. Fla. 1988). To allow an award for artifacts recovered under *Tidewater*'s reasoning would provide an incentive for a salvor to purposefully conduct salvage operations despite the owner's refusal. Furthermore, in a treasure salvage case, it could encourage potential salvors to intentionally remain ignorant of the ownership of a wrecked vessel in order to maintain salvage rights. That is certainly not in harmony with the purposes of salvage law. Therefore, this Court declines to apply the Ninth Circuit's reasoning in *Tidewater*.

It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the JUNO was a Spanish ship and that Spain might make a claim of ownership and decline salvage. Before conducting any salvage operations pursuant to this Court's Orders, Sea Hunt received an express communication of refusal of salvage from Spain. Because Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on JUNO, Sea Hunt can not be entitled to any salvage award. The Court realizes that this holding places a substantial burden on Sea Hunt, and places on potential salvors the risk of expending significant time

and resources in salvaging sunken objects for which they will not receive compensation. However, such is the risk inherent in treasure salvage.

For the foregoing reasons, this Court FINDS that Sea Hunt is entitled to no salvage award for salvage services previously conducted on JUNO, and Sea Hunt is DIRECTED to refrain from any further salvage efforts. Sea Hunt is ORDERED to deliver to Spain any artifacts salvaged from JUNO which are currently in Sea Hunt's possession. Should Sea Hunt inadvertently salvage artifacts from JUNO during the course of other salvage operations in the designated salvage areas, such artifacts will be turned over to Spain as owner of JUNO, and no salvage award will be required.

The Clerk is DIRECTED to send a copy of this Opinion and Order to all counsel.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke, Jr.

United States District Judge

June 25, 1999
Norfolk, Virginia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SEA HUNT, INC.,

Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, their apparel, tackle, appurtenances, and cargo located within coordinates 38 degrees 01'36" North Latitude, 75 degrees 14'3" West Longitude; 37 degrees 57'21" North Latitude, 75 degrees 13'00" West Longitude; 38 degrees 01'36" North Latitude, 75 degrees 13'14" West Longitude; 37 degrees 57'33" North Latitude, 75 degrees 17'14" West Longitude
and/or
37 degrees 55'00" North Latitude, 75 degrees 19'18" West Longitude; 37 degrees 54'09" North Latitude, 75 degrees 17'00" West Longitude; 37 degrees 51'21" North Latitude, 75 degrees 18'52" West Longitude, 37 degrees 51'20" North Latitude, 75 degrees 21'05" West Longitude, *in rem*,

Defendant(s).

Case No. 2:98cv281

STATEMENT OF INTEREST OF THE
UNITED STATES DEPARTMENT OF STATE

I, Ambassador Mary Beth West, declare and say as follows:

1. I am the Deputy Assistant Secretary of State responsible for oceans affairs and have served in that position since October 1996. My current title is Deputy Assistant Secretary of State for Oceans, Fisheries and Space. I make this declaration on the basis of personal knowledge or information made known to me in the course of my official

duties. This declaration is submitted on behalf of the United States in the above-captioned case.

2. In my capacity as Deputy Assistant Secretary of State for Oceans, Fisheries and Space, I am responsible for United States policy pertaining to international maritime issues, including, but not limited to, the subject of sovereign warships and recognition of title thereto. As an attorney who previously served as an Attorney-Adviser in the Department of State's Office of the Assistant Legal Adviser for Oceans and Fisheries Affairs, I am also familiar with the United States position on the international law of the sea pertaining thereto.

3. In my current position I have been accorded the rank of Ambassador. As an attorney, I handled international legal issues in the State Department's Office of the Legal Adviser for over 12 years. I was also a visiting Professor of Law at the University of New Mexico School of Law for four years.

4. It is the position of the United States that, under customary international law, sovereign warships and their remains which are identifiable as to the flag State of origin are, unless captured prior to their sinking in armed conflict, entitled to recognition and protection as property of the flag State, unless title to the vessel has been expressly abandoned by the flag State of origin.

5. For example, in 1987 the Department of State asserted to the Government of France that title to the warship ALABAMA of the former Confederate States of America, which had been sunk in 1864 by USS KEARSARGE in battle off Cherbourg, France, vested in the United States Government and that the United States had never abandoned title thereto. In 1989 the Government of France abandoned its assertion of title to the ALABAMA, which was based on the fact that the wreck was found on the seabed within the French territorial sea; in 1989 France conceded that title to the ALABAMA was with the United States.

6. In 1997, the Government of France asserted its title to the warship LA BELLE, the flagship of Robert Cavelier de la Salle during his expedition in the Gulf of Mexico, which sank in 1686 and was discovered in July 1995 in Matagorda Bay south of Texas. The Government of France provided documentary evidence which established that the ship was a warship of King Louis XIV of France entrusted to Monsieur Cavelier de la Salle as part of an official mission on behalf of the King of France, title to which the Government of France has not abandoned. The United States Government is prepared to recognize France's title to the shipwreck of LA BELLE as part of an international agreement currently under negotiation with France.

7. In September 1998, the United Kingdom asserted title to an anchor which fell off the British frigate H.M.S. CONFIANCE into Lake Champlain during the Battle of Plattsburgh Bay on September 11, 1814, during the War of 1812, before the warship was captured by the United States. The United Kingdom authorized the United States to recover the anchor and place it on historical display at the Lake Champlain Maritime Museum. The United Kingdom has asserted its title to other British warships sunk in the 18th, 19th and 20th Centuries and later located in United States waters. The United States has recognized those claims.

8. The United States recognizes the claims of Germany to title to Nazi U-boats sunk during World War II and located in United States waters.

9. As the foregoing examples illustrate, it is the policy of the United States Department of State to recognize claims by foreign governments – such as in this case by the Government of Spain regarding the warships JUNO and LA GALGA – to ownership of foreign warships sunk in waters of the United States without being captured, and to recognize that title to such sunken warships is not lost absent express abandonment by the sovereign.

10. Further, I have examined the provisions of the Treaty of Friendship and General Relations between the United States of America and Spain signed at Madrid July 3, 1902, 33 Stat. 2105, Treaty Series 422, 11 Bevans 628. The records of the Treaty Office of the Department of State show that this treaty entered into force April 14, 1903, and remains in force between Spain and the United States.

11. Article X of this treaty provides:

> In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other, whether *belonging to the State* or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases.

(Emphasis added.)

12. Through its Embassy's Diplomatic Note No. 43/98, dated May 8, 1998, Spain has requested the United States to ensure recognition of Spain's ownership of these wrecks and associated artifacts, which have not been abandoned by Spain, to ensure that the remains of these vessels are treated as maritime graves, and to ensure that their salvaging not be authorized at this time.

13. Article X, by the broad scope of its terms ("in cases of shipwreck"), is applicable to ships sunk before as well as after 1902. Because it is not expressly limited to vessels which might sink in the future, under its literal terms, it therefore applies to vessels already sunk in 1902 that otherwise come within the terms of Article X. Its application, however, is necessarily prospective. I understand that this provision is unique in that no other treaty of friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded provision applying to State ships entitled to sovereign immunity. It

should be noted that the comparable provision in the 1795 Treaty of Friendship, Limits and Navigation between Spain and the United States, 8 Stat. 138, T.S. 325, 11 Bevans 516, article X, does not expressly mention State ships.

14. It is in the foreign policy interest of the United States to honor the request of the Government of Spain. It is the opinion of the undersigned that Article X requires application of the principles of sovereign ownership ("the same ... protection and the same immunities"), which exist under customary international law, as set forth above. Further, Article X imposes on the United States the responsibility to afford to these Spanish vessels the same assistance and protection and the same immunities which would be granted to sunken United States warships in the same location.

15. It is the view of the U.S. Department of State that U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment. Under the Constitution of the United States as interpreted by the Courts of the United States, it cannot be presumed that the U.S. Government has abandoned its sunken warships.

16. The Legislative and Executive Branches of the United States Government have also acted in accordance with the view that title to sunken warships may be abandoned only by an express act of abandonment. Through the Abandoned Shipwreck Act, 43 U.S.C. sec. 2101 *et seq.* (1994) ["ASA"], the United States asserted title to certain *abandoned* shipwrecks (sec. 2105(a)) and transferred said title to the States (sec. 2105(c)). In providing the views of the Department of State to the Chairman of the House Committee on Merchant Marine and Fisheries on S. 858, entitled the "Abandoned Shipwreck Act of 1987", the Assistant Secretary of State for Legislative Affairs wrote "the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or

lack of positive assertions of right are insufficient to establish such abandonment." (Letter of J. Edward Fox to the Hon. Walter B. Jones, Feb. 19, 1988, reprinted in House Rep. 100-514, Part 2, 100th Cong., 2d Sess., at 13.) The House Committee on Interior and Insular Affairs agreed in its report No. 100-514, Part I, pp. 3-4, Mar. 14, 1988 ("The Committee notes that the United States only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act. Passage of time or lack of positive assertions of right are insufficient to establish such abandonment."). These limitations are included in the National Park Service's Abandoned Shipwreck Act Guidelines, vol. 54, Federal Register, No. 63, April 4, 1989, pp. 13642 *et seq. passim.* In consonance with the foreign policy and treaty responsibilities of the United States as stated above, the term "abandoned" when applied in reference to both foreign and U.S. warships is to be given its customary meaning in both international and domestic law, as requiring an express abandonment. Thus foreign warships which have not been expressly abandoned are outside the purview of the ASA.

17. In light of the foregoing, the United States recognizes:

a. the international law rule that warships and their associated artifacts, whether or not sunken, are entitled to sovereign immunity.

b. that sunken warships are historical artifacts of special importance and entitled to special protections; that many have unique histories making them part of their country's traditions; and that they may be the final resting places of persons who died in the service of their nations.

c. that the practice of nations confirms the well-established rule of international law that title to such vessels is lost only by an express act of abandonment, gift or sale by the sovereign in accordance with relevant principles of international law and the law of the flag State governing

abandonment of government property, or by international agreement or by capture or surrender during battle before sinking.

d. that, absent an express act of abandonment, a coastal State (such as the United States) does not acquire any right of ownership to a sunken warship by reason of its being located on or embedded in the sea-bed over which it exercises sovereignty or jurisdiction, and a State of the United States does not acquire any right of ownership to a sunken warship by reason of its being located on or embedded in the sea-bed to which the State was given certain rights by the Submerged Lands Act, 43 U.S. Code sec. 1301 *et seq.*, and the Abandoned Shipwreck Act, 43 U.S. Code sec. 2101 *et seq.* (1994), although access to such vessels is subject to coastal State control in accordance with international law.

e. that, absent an express act of abandonment, no person or State may salvage or attempt to salvage sunken warships or their associated artifacts, wherever located, without the express permission of the sovereign flag State, whether or not the vessel is a war grave.

f. that sunken warships containing crew remains are entitled to special respect as graves and must not be disturbed without the explicit permission of the sovereign.

18. Adherence to these principles is of great importance to the United States, which has nearly 3,000 sunken warships located around the globe, some 1,300 in U.S. waters and over 1,500 in foreign and international waters. If the United States does not grant such protection and immunities to U.S. or foreign warships sunk in its own waters, it would expect difficulties in seeking those same protections and immunities for sunken U.S. warships in foreign or international waters. In particular, if the United States does not protect the wrecks of the Spanish warships JUNO and LA GALGA as requested by Spain it could be expected that Spain would not be prepared to protect sunken U.S. warships discovered in

Spanish waters. Further, the Congress of the United States has recognized that it is in the public interest to preserve our national maritime heritage. 16 U.S.C. sec. 5401.

19. A previous opinion of the Deputy Legal Adviser of the Department of State given in 1980 to the same effect, relating to sunken World War II Japanese warships, appears in the DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1980, pages 999-1006 (Marian Nash Leich ed., Dep't of State Pub. 9610, 1986).

20. A portion of the memorandum attached to that opinion (pages 1003-1004) cites a number of older cases, the oldest of which involved a British frigate sunk in 1781 or 1782 in New York waters, for the proposition that abandonment of title to warships may be express or implied. The memorandum also states:

> The practice of the U.S. and other countries in recent years has been to depart from the earlier view that abandonment of a warship could be implied by the long passage of time (the premise, for example, in [the case involving this 18th Century British frigate]). Factors such as an increased reluctance to abandon title to U.S. government property, including vessels that have become, in many situations, the final resting place of military personnel, as well as the existence of more sophisticated methods of salvaging vessels and communicating decisions to abandon vessels, have in effect resulted in a demise of the earlier view. In the absence of an express transfer or abandonment of a U.S. warship sunk in the near past (*e.g.*, in the World War II era), it should be presumed that title to such vessels remains in the U.S. Title to vessels sunk in the more distant past (such as during

> the 17th and 18th centuries) would, of course, still be determined by the more conventional interpretation of that period.

21. The last sentence of this quotation does not state current U.S. policy and is not consistent with the current practice of the United States and other countries. The procedures for the abandonment of sunken U.S. warships located outside the territory of the United States, set forth in 10 U.S. Code sec. 7305-7308 and 7545 (1994) and implementing regulations 32 C.F.R. parts 172 and 736 (1997), and for other U.S. vessels in 40 U.S. Code sec. 484(i) (1994) and 46 U.S. Code App. sec. 1158 (1994), make no provision for implied abandonment or impose any limitation as to the age of U.S. property. The practice of the United States and other countries since 1980 with regard to "vessels sunk in the more distant past" is now consistent with that related to "warships sunk in the near past", *i.e.*, their abandonment is not to be presumed or implied, but must be express. *Accord* Gerald J. Mangone, UNITED STATES ADMIRALTY LAW 225 (Kluwer, 1997) ("U.S. warships, for example, sunk and untouched for more than a century, will not be considered as abandoned").

22. Neither of the two multilateral international treaties on salvage permit the salvage of sunken warships without the express permission of the flag State. The 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (the Brussels Convention), 37 Stat. 1658, T.S. 576, 1 Bevans, 780, is expressly not applicable to warships, as Article 14 thereof provides "This convention does not apply to ships of war or to Government ships appropriated exclusively to a public service". The 1989 Convention on Salvage, Sen. Treaty Doc. 102-12, Sen. Exec. Rep. 102-1, similarly provides in Article 4, State-owned vessels, that "1. . . . this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to

sovereign immunity under generally recognized principles of international law unless the State decides otherwise." These multilateral treaties are but two of the more than 50 treaties in force that recognize the sovereign immunity of warships. Most of these treaties are listed in ROACH & SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 466-471 n.45-67 (Kluwer 2d ed. 1996).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 18th day of December 1998, in Washington, D.C.

/s/ Mary Beth West

Ambassador Mary Beth West
Deputy Assistant Secretary
(Oceans, Fisheries and Space)
United States Department of State

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SEA HUNT, INC.,

Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, their apparel, tackle, appurtenances, and cargo located within coordinates 38 degrees 01'36" North Latitude, 75 degrees 14'33" West Longitude; 37 degrees 57'21" North Latitude, 75 degrees 13'00" West Longitude; 38 degrees 01'36" North Latitude, 75 degrees 13'14" West Longitude; 37 degrees 57'33" North Latitude, 75 degrees 17'14" West Longitude and/or 37 degrees 55'00" North Latitude, 75 degrees 19'18" West Longitude; 37 degrees 54'09" North Latitude 75 degrees 17'00" West Longitude; 37 degrees 51'21" North Latitude, 75 degrees 18'52" West Longitude, 37 degrees 51'20" North Latitude, 75 degrees 21'05" West Longitude, *in rem*,

Defendant(s).

Case No. 2:98cv281

STATEMENT OF INTEREST OF THE
UNITED STATES DEPARTMENT OF DEFENSE

Rear Admiral John D. Hutson, Judge Advocate General's Corps, United States Navy, deposes and says under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am the Judge Advocate General of the Navy, and I also serve as the Department of Defense Representative for Ocean Policy Affairs. I make the statements herein on the basis of personal knowledge or information made known to me in the course of my official duties.

2. In my capacity as Judge Advocate General of the Navy, I am responsible for providing legal and policy advice to the Secretary of the Navy on admiralty, maritime, and international law. As the Department of Defense Representative for Ocean Policy Affairs, I serve as the central point of contact and represent the Department of Defense in international and interagency negotiations for matters involving the law of the sea and related ocean policy.

3. Based on official records, the Naval Historical Center currently estimates that 3,000 U. S. Navy vessels lie submerged around the world. Of these, as a very rough estimate, approximately 1,500 vessels are believed to lie in the territorial seas of foreign nations or in international waters. Many of those vessels were lost in World War II.

4. Additionally, approximately 15,000 Navy aircraft lie submerged around the world. Of these, approximately 5,000 lie in foreign or international waters. The legal issues regarding salvage of these aircraft are substantially the same as those involved in vessels and the following arguments apply to them at least to the degree they do to vessels. Specific reference to aircraft is omitted in the following discussion only due to the limited scope of the instant litigation. The large number of submerged aircraft and the comparative ease with which submerged aircraft can be recovered highlights the importance of a correct resolution of these issues.

5. The protection of sunken or submerged vessels from unauthorized salvage, theft, dismemberment, destruction, or disturbance is of high importance to the Department of Defense. Many such vessels are war graves, or are the final resting places of United States service members. As such, submerged vessels are due the same deference as a national cemetery. Some of the vessels or their equipment or cargo are of continuing monetary value. A few still contain classified information or features relevant to the national

security. Many such vessels are of significant cultural importance, often representing unique repositories of artifacts emblematic or instructive of national or maritime history. Many submerged naval vessels also contain unexploded ordnance, which may pose severe dangers to those visiting them. Further, many submerged vessels also contain lead, oil, asbestos, or other materials, which may pose an environmental hazard if released into the environment through disturbance of the site. Efforts to exploit these sites need to be carefully controlled.

6. United States policy has consistently been that these sunken sovereign vessels remain the property of the United States absent the government's formal, affirmative abandonment, sale or donation of ownership, pursuant to Act of Congress and implementing regulations. *See, e.g., Hatteras, Inc. v. U.S.S. Hatteras*, 1984 A.M.C. 1094 (S.D. Tex. 1981), *aff'd mem.* 698 F.2d 1215 (5th Cir. 1983). This policy has been sanctioned by federal court rulings, and it applies regardless of condition, location, or date of sinking of the vessel. The United States maintains title to such vessels regardless of the circumstances of the sinking, which may include intentional scuttling, sinking after the crew has abandoned ship for lifesaving purposes, or sinking during use as a target. The policy of perpetual ownership facilitates government supervision of these wrecks and serves the United States Government's and the public's interests in preserving the sanctity of service members' graves, preserving historic cultural resources, maintaining the government's fiscal and property interests, and protecting the public against the potential dangers posed by unexploded ordnance and environmental degradation.

7. Consistent with its other interests the Navy's policy generally has been to allow open access to U.S. Navy wreck sites for recreational divers, at the divers' own risk, so long as the site is not disturbed – "Look but don't loot" – and so

long as access does not involve risks to personal safety, military security, or the environment.

8. It is the policy and practice of the United States to allow such vessels to remain where they lie until such time as it is in the government's interest to recover them in their entirety or in part or to exploit them for the sake of historical or archaeological study. Because of limitations at any one time on the availability of funding to conduct exploration and/or salvage to curatorial standards and limitations on technology required to accomplish such operations consistent with the government's and public's long-term interests, it is the U.S. Government's practice to cautiously consider any proposed action with respect to such wrecks. Because of variables such as water depth, proximity to land, the degree to which a submerged craft is embedded in the sea bottom, and the date of the sinking, it is not possible to predict, with any degree of certainty, just how much it would cost the United States to salvage or to demonstrate affirmative control over submerged vessels by physically preventing their disturbance. To permit salvage of such vessels without the government's prior authorization would either put those wrecks and sites in serious danger or compel the government to expend immense sums to effect preemptive recovery or to attempt to enforce affirmative control as the means to deny salvage. For the United States policy to be effective, United States title and control with respect to such wrecks must be of indefinite duration.

9. Because a large number of wrecked United States Government vessels are in foreign or international waters, it is in the United States interest that other sovereign nations recognize the United States perpetual interests in its wrecks. A clear inducement for other nations to do so is the United States and its constituent States reciprocal recognition of the sovereign title and ownership interests of other sovereign governments in their wrecks in United States waters. To that end, requests of private individuals or entities for permission

to salvage foreign sovereign vessels sunk, without capture, in United States waters are routinely referred to cognizant foreign state owners. United States failure to recognize such foreign sovereign interests will make it less likely that other nations will recognize the United States interests in its wrecks in their waters.

10. Reciprocal recognition of sovereign rights is emerging as customary international practice. For example, the Department of State negotiated a bilateral agreement with France regarding the remains of the C.S.S. Alabama, a Confederate warship that was sunk off Cherbourg in 1864 by U.S.S. Kearsarge. By that agreement France recognized U.S. title to the wreck and both nations agreed to cooperate in the investigation, protection, and eventual recovery of the wreck. Inherent in such negotiations is the good-faith understanding that, when roles are reversed, the United States will recognize appropriate foreign sovereign claims and will take reasonable measures to protect foreign sovereign property.

11. The Department of Defense has a strong interest in ensuring that the *Juno* and *La Galga* are treated in the same way that we would want U.S. Navy, U.S. Army, U.S. Air Force and other submerged sovereign, non-commercial United States wrecks in foreign waters to be treated.

FURTHER AFFIANT SAYETH NOT.

Executed this 18th day of December 1998, under penalty of perjury pursuant to 29 U.S.C. § 1746.

/s/ John D. Hutson

JOHN D. HUTSON
Rear Admiral
Judge Advocate General's Corps
United States Navy

[Embajada de España]

UNOFFICIAL TRANSLATION

VERBAL NOTE

No. 43/98

The Embassy of Spain presents its compliments to the Department of State and, regarding the request presented by the company Sea Hunt Inc. before the Federal Court of the State of Virginia concerning the salvaging of the vessels believed to be Juno and La Galga, has the honor to inform:

1) The vessels Juno and La Galga and their associated artifacts are the property of Spain, who has never acted in a manner that would expressly or tacitly signify their abandonment. The relevant historical documentation will be presented shortly.

2) It is Spain's wish that the remains of these vessels be treated as maritime graves and that their salvaging not be authorized at this time.

3) In accordance with article 10 of the Treaty of Friendship between Spain and the United States signed in 1903, the Embassy of Spain requests that the competent authorities take the necessary steps to ensure the above including those related to the Federal Court of the State of Virginia involved, and grant to these vessels the same assistance, protection and immunities that shipwreck property of the United States would merit.

The Embassy of Spain avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., May 8, 1998.

DEPARTMENT OF STATE
LEGAL BUREAU
SPANISH DESK

NOTE NO: 41

Her Britannic Majesty's Embassy presents its compliments to the Department of State and has the honour to refer to the proceedings in the United States District Court for the Eastern District of Virginia, Norfolk Division, brought by Sea Hunt Inc. and referenced Case No. 2:98cv281.

In the proceedings the judge concludes that, by virtue of Article XX of the Definitive Treaty of Peace between France, Great Britain and Spain of 10 February 1763, the Kingdom of Spain can be taken to have abandoned its title to the frigate "La Galga" which was wrecked in 1750. As a party to the said Treaty of 1763, Her Majesty's Government wishes to place on record its interpretation of the Treaty. Her Majesty's Government takes the view that Article XX of the 1763 Treaty cannot be interpreted as involving an express abandonment by Spain of its rights to the shipwreck "La Galga". This view is supported by the last sentence of Article XX which clearly distinguishes movable, from immovable, property. Rather, in Her Majesty's Government's view, the intention behind Article XX was to transfer sovereignty over the territories mentioned in that Article, and not to deal with, or otherwise affect, the quite separate issue of the ownership of shipwrecks on the waters adjacent to these or other territories in North America.

Furthermore, Her Majesty's Government wishes to emphasise that it has consistently taken the general position that treaties of cession, such as Article XX of the 1763 Treaty, should not be regarded as involving transfers of property in shipwrecked warships in the absence of some clear contrary indication. The position of Her Majesty's Government would be the same in relation to the Definitive Treaty of Peace between Great Britain and the United States, done at Paris on 3 September 1783.

Her Majesty's Government would be grateful if the Department of State could convey these views to the court.

The Embassy avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

BRITISH EMBASSY/WASHINGTON (SEAL)

[Dated: July 7, 1999]

[Embajada de España]

UNOFFICIAL TRANSLATION

VERBAL NOTE

Num. 60/99

The Embassy of Spain presents its compliments to the Department of State and in relation to the Department of State Verbal Note of today, has the honor to refer to the proceedings concerning the Spanish Navy Frigate "La Galga" in the United States Distric [sic] Court of the Eastern Distric [sic] of Virginia. By previous communications, the Department of State has been informed that H.M. Frigate "La Galga" was a serving vessel of the Spanish Navy engaged on active duty at the time of her sinking as escort to a convoy of vessels en route from Mexico to Spain.

In the above-referenced proceedings, the judge has entered an order of April 27, 1999 stating that H.M. Frigate "La Galga" ceased to be the property of Spain by virtue of the Definitive Treaty of Peace between France, Great Britain and Spain on 10 February 1763 and in particular the provisions of Article XX in which an exchange of certain territory with Great Britain was effected between Spain and Great Britain. The Embassy of Spain desires by this Note to affirm to the Department of State Spain's interpretation and understanding of the Treaty of 1763 and to express its agreement with Note Number 41 of Her Britannic Majesty's Embassy on the same subject.

In view of the above-referenced order, the Embassy of Spain reaffirms its view that Article XX of the 763 [sic] Treaty was not a cession or abandonment of H.M. Frigate "La Galga" or other shipwrecked vessels of Spain. Article XX was also not a cession of shipwrecked vessels or other

state property situated on the seabed, a subject which is not addressed in Article XX. It should also be noted in this connection that Article XX includes specific reservation of continued ownership and rights of removal with respect to Royal effects and other moveable Royal property, such as H.M. Frigate "La Galga". This reservation has no expiration or other time limitation, in contrast to specific time periods designated for carrying out other undertakings of the Treaty. The Embassy of Spain further notes that the principle of sovereignty and non-interference with state vessels was specifically recognized in the 1667 Treaty of Madrid between Spain and Great Britain and was reaffirmed to the fullest extent in Article II of the 1763 Treaty.

The Embassy of Spain takes this opportunity to renew to the Department of State its expression of appreciation for the United States for its assistance and support in recognizing the principles of sovereignty with respect to state vessels and in the protection of the remains of those who died in the service of their country and to renew to the Department of State the assurances of its highest consideration.

Washington, DC, July 8 1999

LEGAL BUREAU
SPANISH DESK
WASHINGTON, D.C.

Supreme Court, U.S.
FILED
JAN 31 2001
OFFICE OF THE CLERK

(4)

No. 00-652

IN THE

Supreme Court of the United States

SEA HUNT, INCORPORATED,

Petitioner,

v.

KINGDOM OF SPAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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ARGUMENT

SOVEREIGN IMMUNITY v. FUTILITY; IS THERE A CONFLICT?

There are presently three (3) Petitions for Writ of Certiorari pending before the Court, all of which address identical issues of (1) whether an admiralty court's use of "implied abandonment" in an *In Rem* salvage action is prohibited by the United States Constitution; (2) when a sovereign nation intervenes claiming ownership of the *res*, must our admiralty courts require the states and/or the Salvors to show "express abandonment" of the *res*? (3) to show abandonment of a *res* by a sovereign must there be a congressional act providing authority to an administrative official and a written affirmative act by the administrative official formally abandoning sovereign ownership interests?

In *International Aircraft Recovery, LLC v. United States of America*, 218 F.3d 1255 (11th Cir. 2000), Petition for Cert. filed October 16th, 2000, Case No. 00-617, the Respondent UNITED STATES argues on page 9 of its January 24, 2001 Brief in Opposition that:

> Well settled doctrine rooted in the property [Public Lands] clause of the Constitution holds that the federal governments interests in property may not be impliedly abandoned, but rather can *only* be relinquished by an express, affirmative renunciation of property rights that is duly authorized by Congress. *United States v. California*, 332 U.S. 19, 39-40 (1947). . . .

In the KINGDOM OF SPAIN's January 11, 2001 Brief in Opposition, page 11, it is argued that:

> Both the United States and Spain agree that the [1902] Treaty provides that Spanish ships sunk in U.S. Territorial waters are accorded the same immunity as U.S. ships sunk in U.S. waters. As the Court of Appeals noted, U.S. vessels "may only be abandoned by an express, unambiguous, and affirmative act." . . . *United States v. California*, 332 U.S. 19, 39-40 (1947).

Judge Henry Friendly once observed that "Reality beats a quick retreat against the onslaught of argument." Based upon the Petitions by the *Commonwealth of Virginia* and *Sea Hunt*, and the Petition by *International Aircraft*, it should become obvious that all three are inextricably intertwined and should be consolidated by this Court for the purpose of "preserving adequate harmony and appropriate uniform rules relating to maritime matters . . . " *Knickerbocker Ice Company v. Stuart*, 253 U.S. 149 (1920).

In *International Aircraft*, the United States argues on pages 11 and 12 of its Brief in Opposition:

> Petitioner also errs in asserting (See Pet. 9, 19) that the decision below establishes new sovereign immunity principles that conflict with this Court's decisions in *Deep Sea Research*, *supra* and *The Davis*, 77 U.S. (10 Wall.) 15 (1869). . . . That contention, however, mischaracterizes the holding below and posits an illusory conflict with *Deep Sea Research* and *The Davis*. Nothing in the Court

> of Appeals decision purports to hold that some principle of sovereign immunity bars a federal court sitting in admiralty from determining claims against sovereign property that is not within the sovereign's actual possession. To the contrary, the Court did in fact *adjudicate competing claims* concerning the property and held, on the merits, that the government retained an ownership interest in the property and therefore had a right to reject salvage services. As such, the decision does not turn on considerations of sovereign immunity and does not in anyway conflict with *Deep Sea Research* or *The Davis*. (emphasis supplied)

The KINGDOM OF SPAIN argues on pages 15 and 16 of its Brief in Opposition:

> Sea Hunt asserts (Sea Hunt Pet. 9) that . . . "The Fourth Circuit is providing Spain a sovereign immunity and/or exemption for a direct proceeding *In Rem* against all vessels originally owned by Spain," contrary to this Court's decision in *California v. Deep Sea Research, Inc.* 523 U.S. 491 (1998). Sea Hunt simply misreads this Court's decision in *Deep Sea Research*. That decision holds that a state's immunity from suit under the Eleventh Amendment does not extend to an *In Rem* proceeding, at least if the *res* is not within the actual possession of the state. Assuming that the holding in *Deep Sea Research* applies with full force for a sovereign nation, the Court of Appeals decision in this case is entirely consistent with *Deep Sea Research*. Spain did not contend

> that the District Court lacked authority to determine ownership of the shipwrecks. Instead, Spain appeared before the Court and submitted a claim to the *res*. The Court below considered Spain's proofs of ownership, *evaluated Petitioner's counter-evidence*, and ruled in favor of Spain on the merits. That is a very different matter from holding that the sovereign immunity of the Kingdom of Spain extends to *In Rem* proceedings or that Spain is "exempt" from *In Rem* proceedings in admiralty. Sea Hunt's effort to manufacture a conflict with this Court' decision in *Deep Sea Research* is baseless. (emphasis supplied)

What . . . "competing claim" . . . would the Eleventh Circuit allow International Aircraft to assert against the aircraft? What . . . "counter-evidence" . . . would the Fourth Circuit allow Sea Hunt or the Commonwealth of Virginia to assert against vessels lost by Spain 250 years ago? When an intervening sovereign claims that the *res* was never "expressly abandoned" there is *no* competing claim or counter-evidence because it never existed! The sovereign intervenor wins — every single time!

Litigation is, in reality, the insider's game within the game. Attorneys who are to serve the interests of each member of the public (and whose labors are compensated by the public) are manipulating our detailed rules of procedure. Many judges, acting more like referees, become unwitting accomplices. Without the steady application of this Court's view of what is *really* happening, the procedural rules are being manipulated to avoid the crystal clear holdings of this Court. In *Florida Dept.of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 710 (1982), Justice Stevens, writing for the

plurality, was discussing whether a sovereign could obtain immunity from a maritime salvage lien in . . . "In Rem actions brought against vessels in which an official of the state, the federal government or a foreign government has asserted ownership of the *res*." Sixteen years later, Justice Stevens (in his specially concurring Opinion) in *California v. Deep Sea Research*, 523 U.S. 496, 509 (1998), conceded that an error had been made in *Treasure Salvors* and that,

> Having given further consideration to the special characteristics of *In Rem* admiralty actions, and more particularly to the statements by Justice Story and Justice Washington . . . I am now convinced that we should have affirmed the *Treasure Salvors* judgment in its entirety.

In effect, this Court has done so and, in effect, the United States working with the Kingdom of Spain has managed to circumvent these rulings.

It was nearly three years ago in *Deep Sea Research* that this Court again revisited the use of sovereign immunity in *In Rem* salvage actions. Quoting from *The Siren*, 74 U.S. 152 (1868) and *The Davis*, 77 U.S. 15 (1869), this Court held that the "fundamental premise" in those cases remains valid in today's *In Rem* admiralty actions. This Court explained the "fundamental premise" to be that:

> Proceedings *In Rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the Court. (citation omitted) The possession referred to was actual

> possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. [and that] The Court's jurisprudence respecting the sovereign immunity of foreign governments has likewise turned on the sovereign's possession of the *res* at issue. *Deep Sea Research*, 523 U.S. at 507

Implicit within the argument advanced by the Kingdom of Spain in opposing the Commonwealth of Virginia and Sea Hunt's Petitions and by the United States in *International Aircraft* is the acknowledgment that arguing "sovereign immunity" would be futile; however, the United States (working with the Kingdom of Spain) has not hesitated to manipulate the rules of procedure in the admiralty courts to shift the burden from a sovereign intervenor claiming ownership to the States and/or the Salvor who must then provide proof of . . . "an express, affirmative renunciation of property rights that is duly authorized by Congress". By shifting the burden of proof from the intervening [sovereign] claimant to the states and/or Salvor, and then requiring proof of Congressional and administrative action (which did not exist in this country until after 1945 and which will, more than likely, *never* exist with regard to the Kingdom of Spain) requires the Petitioners, Commonwealth of Virginia and Sea Hunt, Inc., to do the *impossible*!

Our country's maritime history was "written" by ships of Spain, Portugal, Britain, France, etc. Thousands of ships were lost well prior to the advent of the legal concept of "express abandonment." Unless this Court consolidates *International Aircraft*, No. 00-617, *Commonwealth of Virginia*, No. 00-629 and *Sea Hunt*, No. 00-652 and

establishes a national standard allowing our admiralty courts to advocate "abandonment" based upon all of the facts and circumstances of each case our maritime history will be "abandoned." Practically every *in rem* salvage action involving an historic *res* will involve a sovereign intervenor claiming "ownership." The states and salvors will not *only* be precluded from further salvage but will lose all right title and interest to the *res* that has been recovered.

As pointed out by the Commonwealth of Virginia on page 9 of it's Petition, the only way the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106, can vest title to a shipwreck in a state within whose submerged lands it is imbedded is if the shipwreck has been "abandoned" by its original owner. By requiring the individual states and/or the private salvors to show "express abandonment" under a legislative act (before such a legislative act became a part of the legal concept of "express abandonment") means that nearly all historic vessels and historic aircraft that still exist will be "confiscated" by their original owners upon their discovery. "Express abandonment" as construed by the Eleventh and Fourth Circuits, totally destroys *any* state protection and responsible management of these historic resources. The individual states, working with private salvors under the ASA, and the Federal District Courts sitting in admiralty are in the *unique* position of insuring that the cultural riches of this country and other historic treasures recovered from the sea are shared with the public. *See Cobb Coin Company, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 549 F. Supp 540, 559 (S.D. Fla. 1982); *International Aircraft Recovery v. The Unidentified Wrecked and Abandoned Aircraft*, 54 F. Supp. 2d 1172, 1182 (S.D. Fla. 1999).

The passage of the Abandoned Shipwreck Act of 1987 was a *direct* result of this Court's 1982 decision in *Treasure Salvors*, *supra*. Was the Spanish Galleon *Atocha* "expressly abandoned" by the Kingdom of Spain when Treasure Salvors/ Mel Fisher found it in the early 1970's? Was the Spanish Galleon *La Galga* "abandoned" by its Captain and the Kingdom of Spain when Spanish salvage efforts commenced in August ended in October 1750 (Resp. 3)? Only this Court has the answer to these questions.

CONCLUSION

This Court has unanimously discarded the concept of an assertion of "sovereign immunity" in an *In Rem* salvage action where the *res* is not within the actual (physical) possession of the sovereign. Allowing the sovereigns (United States and Kingdom of Spain) to require our admiralty courts to shift the burden to the states and/or private salvors and requiring proof of "express abandonment" which did not exist at the time of loss is the functional equivalent of granting "sovereign immunity" to all sovereign nations. Using the considerable litigatory might of the United States and the Kingdom of Spain, there is a clear and present danger to the exclusive *In Rem* salvage jurisdiction of our admiralty courts. "Express abandonment" has now replaced "sovereign immunity" as a sovereign defensive *and* offensive legal weapon. When reduced to its simplest terms, our admiralty courts lose *In Rem* jurisdiction to adjudicate a salvage award and lose jurisdiction to allow the salvage to continue regardless of "possession" of the *res* by the Admiralty Court. The Respondent argues that . . .

> if the sovereign owned the *res* at the time it was lost, even though the sovereign subsequently

> *forgot* about the *res* (and *still* doesn't know where it was lost), a state and/or salvor cannot assert a maritime lien in the Admiralty Court because the sovereign can (and will) intervene and deny that it was "expressly abandoned!

The Spanish vessel *Juno* was lost in heavy fog 200 years ago. The *La Galga* was salvaged by her Captain until a storm came and . . . "*broke up what was left of the ship*" . . . over 250 years ago. (Pet. App. A at 6a). When did the legal *concept* of "express abandonment" (much less sovereign legislation) arise in our admiralty law? The time to address a national standard for a fact driven adjudication of abandonment is now! The ASA and the protection of our nation's maritime cultural heritage and maritime history demands it. Article III, Section 2 of our Constitution *requires* it.

Respectfully submitted,

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